

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2020-485-324
[2020] NZHC 1669**

UNDER the Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules 2016

BETWEEN THE NEW ZEALAND TAHR
FOUNDATION INCORPORATED
Applicant

AND THE MINISTER OF CONSERVATION
First Respondent

THE DIRECTOR-GENERAL OF
CONSERVATION
Second Respondent

Hearing: 8 July 2020

Counsel: J E Hodder QC, A C Dartnall and S W H Fletcher for applicant
D A Laurenson QC and E N C Lay for respondents
M C Harris and P D Anderson for Forest and Bird (intervener)

Judgment: 10 July 2020

RESERVED JUDGMENT OF DOBSON J

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Introduction

[1] Himalayan tahr were introduced into New Zealand in 1904, and thereafter in the early 1900s, for recreational and hunting interests. They successfully established themselves over what is now a feral range of some 706,000 square kilometres of the Southern Alps.¹

[2] In recent decades, a niche tourist trade has developed for visitors prepared to pay substantial sums to be taken on guided hunting tours to shoot tahr. In particular, mature bull tahr are sought after as trophies by those with the requisite interest and financial resources to fund such an adventure. Recent projections of the value of this tourist trade put it at close to \$100 million per year.

[3] Tahr are herbivores and graze primarily on alpine tussock grasslands. They are recognised to have had a widespread impact on montane grasslands, especially during the 1960s when their densities were at high numbers, so control of their numbers is seen as ecologically important.

¹ DoC's control focuses on public conservation land (including national parks) which comprise 573,000 hectares (81 per cent), the remainder being under private control.

[4] Control occurs within the statutory framework described below.² The Department of Conservation (DoC) has recently decided to embark on a relatively large-scale culling operation using hunters contracted to operate from helicopters for 250 hours in a period that was scheduled to begin on 1 July 2020 and run for a number of months. In formal terms, the decision was one to approve the 2020-2021 operational plan (the 2020-2021 plan) for control of tahr (the decision).

[5] A number of interest groups for commercial and recreational hunters of tahr that are represented by the applicant in this proceeding (the Foundation) take issue with the decision and this application for judicial review challenges its lawfulness.

The parties

[6] The Foundation is an incorporated society that was formed in November 2016 to represent groups with an interest in managing the tahr herds of New Zealand. Its members include professional hunting guides, assisted trophy hunters, deerstalkers and other recreational hunters, and high-country farmers.

[7] The first respondent is the Minister of Conservation (the Minister) and the second respondent is the Chief Executive of DoC. Both the respondents have powers and responsibilities under the Wild Animal Control Act 1977 (the Act). There is no issue as to the authority of the delegated decision-maker, and it is adequate to describe the conduct in issue in the proceeding as that of DoC.

[8] The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) is an incorporated society for the advancement of conservation values. By consent, it has been afforded status as an intervener in this proceeding. In March 2020, Forest and Bird commenced its own proceeding seeking a declaratory judgment to challenge the lawfulness of DoC's 2019 operational plan for the control of tahr. Leave was given for Forest and Bird to provide written submissions, and counsel appeared to respond to questions arising from them. Forest and Bird supports the decision that is being challenged.

² See [11]–[18] below.

Timing

[9] The imperative is to provide a result promptly. First, because DoC had contemplated commencing culling operations from 1 July 2020. It was not prepared to defer that, on the basis of any entitlement the Foundation claimed to interim relief, beyond the early date for the substantive hearing that had been arranged. Secondly, as I warned the parties, I become unavailable after 10 July 2020 for a fortnight.

[10] Having regard to these circumstances, I assure the parties I intend no disrespect by dealing somewhat more summarily with the facts than the extent of the evidence and the quality of the arguments may have deserved. I have traversed all of the evidence and the materials exhibited to the affidavits, and explain the reasons for my decision by reference only to the most material aspects of them. Where I have not acknowledged all details going to any particular issue, I am satisfied that the additional arguments on any issue that I have not recorded would not have altered the outcome as I have decided it.

The legal context

[11] Tahr is a species that is subject to the Act, s 4 of which provides:

4 Wild animals to be controlled

- (1) This Act shall apply to all land, having regard to the provisions of any Act applying to the land, and shall be for the purposes of controlling wild animals generally, and of eradicating wild animals locally where necessary and practicable, as dictated by proper land use.
- (2) This Act shall be administered, having regard to the general purposes specified in subsection (1), so as to—
 - (a) ensure concerted action against the damaging effects of wild animals on vegetation, soils, waters, and wildlife; and
 - (b) achieve co-ordination of hunting measures; and
 - (c) provide for the regulation of recreational hunting, commercial hunting, wild animal recovery operations, and the training and employment of staff.

[12] The Minister's general powers include, in s 5, the following:

5 Minister's general powers

- (1) The Minister shall have the primary responsibility on any land for, and may from time to time do, all or any of the following things:
- (a) prepare and carry out wild animal surveys, assessments of hunting and hunter influences, and any other matters concerning the incidence of wild animals and the means of controlling them:
 - (b) co-ordinate the policies and activities of departments of State, local authorities, land owners and occupiers, boards, and public bodies in relation to the control, and (where necessary) eradication, of any species of wild animals:
 - (c) conduct wild animal research work, co-ordinate such research work, and arrange for other departments or organisations to do such work or to collaborate in such work:
 - (ca) approve statements of general policy for the implementation of this Act, and approve amendments to such statements in the light of changing circumstances or increased knowledge:
 - (d) prepare and issue wild animal control plans and publications relating to wild animals and their control, and collect and disseminate information relating to wild animals:
 - ...
 - (f) make provision for the setting up of such technical, scientific, advisory, and other kinds of committees as he thinks fit:
 - (g) make provision for the licensing of persons commercially hunting, capturing, transporting, holding, selling, or exporting wild animals, and persons who aid, assist, or guide other hunters in the hunting, capturing, transporting, holding, selling, or exporting of wild animals:
 - (h) specify conditions under which wild animals may be hunted, and periods and times at which they may be hunted, including making such charges and setting such fees as he considers necessary for any permit, service, and other matter consistent with this Act:
 - (i) prescribe forms for any purpose required by this Act, and vary, modify, or revoke any such form:
 - (j) make provision generally for the administration of this Act.
- (2) In the exercise of the powers conferred on him by subsection (1), the Minister may from time to time exercise all or any of the following powers:
- (a) erect dwellings for occupation by officers and employees of the Department engaged in the administration of this Act, and

erect other buildings, and provide all necessary conveniences and amenities:

- (b) establish and carry on any operations or industry relative to the control and, where necessary, eradication of wild animals, and pay such bounties, grants, and subsidies and such other money as he thinks fit:
- (c) sell or otherwise dispose of all or any of the following, namely, food, equipment, ammunition, firearms, skins, live wild animals, the carcasses of any wild animals, and articles used for, or recovered as the result of, any operations for the control of wild animals:
- (d) enter into any contract or agreement for carrying out the purposes of this Act:

...

[13] That is followed in s 5A by a provision requiring that any wild animal control plan or statement of general policy under s 5 is not to derogate from any provision in the Act or other enactment, or any provision in any conservation management strategy. In s 5B, the Minister is required to administer and manage wild animals in accordance with any statements of general policy under s 5(1)(ca), and any wild animal control plan under s 5(1)(d).

[14] In June 1991, the then Minister of Conservation produced a Himalayan tahr management policy (the 1991 policy) under s 5(1)(ca) of the Act. The 1991 policy reviewed the background to management of tahr up until that point, the relevant legislative provisions, the impact of tahr on natural resources, and recognition of the potential positives and negatives of the presence of tahr. The tahr management policy was then set out in the following terms:³

- to determine, and review from time to time in accordance with evidence from monitoring, the population of thar which for any area is consistent with an ecologically acceptable vegetation and estate condition (the target level). (Note: for some particularly sensitive areas within the thar range, the target level may be zero);
- to ensure that the target level of thar population for each area is not exceeded.

³ For unknown reasons, the spelling has evolved from “thar” (at the time of the 1991 policy) to “tahr” (which is currently used).

(Note: where the level of control required to achieve an appropriate vegetation and estate condition cannot be practically achieved, the lowest practicable thar density will be maintained);

- to prevent any northwards or southwards extension of the thar breeding range;
- to provide for commercial hunting as a means of maintaining thar at or below the target levels;
- to facilitate control by the Department of Conservation where thar are not being held at or below target levels;
- to allow the commercial use of thar under captive conditions where this poses no risk of extending the thar breeding range.

[15] The policy document continued:

The absence of sufficient information on the interaction of thar and their habitat requires caution in setting a maximum number for the whole of the thar breeding range. A number towards the higher end of the habitat's maximum carrying capacity (est. 50,000 assuming no extension of the current range) is known to have unacceptable adverse impacts on vegetation and is not acceptable. The number (est. 5000) achieved by commercial hunting is likely to be impracticable on a sustained basis.

On available evidence a population of not more than 10,000 should not cause unacceptable impacts on vegetation and other natural values, but will provide reasonable hunting opportunities.

This number is indicative only at this stage and reliable information is required to establish densities appropriate to each area.

[16] In 1993, DoC issued a tahr control plan under s 5(1)(d) of the Act (the 1993 plan) following a process of consultation. The Minister of Conservation's introduction included the statement:

The policy acknowledges that a thar population at or close to the habitat's carrying capacity (ca. 50,000) will have unacceptable impacts on vegetation and therefore on native insect and bird fauna. On available evidence a population of 10,000 over the entire range is identified as a presently acceptable maximum, at which impacts on vegetation may be tolerable, and which will provide sufficient hunter satisfaction and commercial opportunities to maintain hunting pressure.

[17] The 1993 plan defined the feral range of the tahr habitat and identified exclusion zones on the perimeter of that range to prevent the spread of their habitat.⁴ The plan divided the areas within the feral range into seven management units. In essence, control of tahr numbers was to be achieved by recreational and commercial hunters, with “official control” by DoC occurring when densities in individual management units appeared to exceed maximum numbers for those management areas.

[18] The feral range for tahr includes the Aoraki/Mount Cook and Westland/Tai Poutini national parks. DoC administers and manages national parks pursuant to the National Parks Act 1980. Section 5A of the Act requires that nothing in a control policy or control plan under the Act can derogate from any provision in other statutes, which relevantly includes the National Parks Act.

The evidence

[19] The substantive hearing was brought on as a matter of urgency to obviate the need for argument on an application for interim orders. The competing cases were supported by a substantial volume of evidence, and the matter was well-argued during a full day, with Forest and Bird having also filed written submissions in advance, and its counsel answering limited questions from me.

For the Foundation

[20] Affidavits have been completed by:

- (a) Mr Francis Duley who is a member of the Foundation representing interests of unaffiliated recreational hunters. Mr Duley is the publisher of “New Zealand Hunter” magazine and also produces an outdoor adventure television show with his son. With the benefit of long personal experience, he recorded his perception of the development of the 1993 plan and more recent annual operational plans. He joined a

⁴ The 1993 plan is a control plan for tahr under s 5(1)(d) of the Act. It is to be distinguished from subsequent operational plans, generally issued for one year periods. It is the operational plan for 2020-2021 that is directly in issue in the proceeding.

meeting convened to discuss the proposed 2020-2021 plan on 19 June 2020 and recorded his observations of it. Mr Duley also completed a short reply affidavit, taking issue with some of the affidavit evidence for DoC.

- (b) Mr Simon Guild, who has an interest as a director of and shareholder in a family-run guided hunting business near the Rakaia Gorge. Mr Guild recorded the impact on the current trading season for his business, which usually runs for 16 weeks, 14 weeks of which have been lost this year. He described a survey that has been conducted into the value to the New Zealand economy of the guided hunting business. That survey has estimated hunt-related and non-hunt spending generated by the guided hunting industry at some \$103 million annually. Mr Guild claims further indirect benefits for the New Zealand economy arising from wealthy tourists, who would not come here but for a guided hunting experience, also undertaking other tourist activities while they are in New Zealand.
- (c) Mr Stephen (Snow) Hewetson, who operates as a hunting guide and is the chair of the Foundation. Mr Hewetson was one of those interviewed in early June 2020 by DoC representatives on their proposals for the 2020-2021 plan. He warned of the adverse effects if large numbers of bull tahr were removed from national parks. He deposed to his belief that tahr hunters are “by far and away the biggest group of kiwis to visit and support” small communities on the West Coast. Mr Hewetson is also critical of the manner in which a 19 June 2020 meeting was run, and expresses a concern that there is no urgent ecological threat requiring dramatic change in the approach to culling tahr. Mr Hewetson has also filed a short reply affidavit taking issue with some of the evidence for DoC.
- (d) Mr Gerald Telford who is the owner and operator of a hunting business based in Wanaka and is a committee member of the Foundation. His affidavit describes the guided tahr hunting industry. He projects that

for a viable industry a herd of close to 24,000 is required and contrasts that with the maximum population within the feral range provided for in the 1993 plan of 10,000 animals. Given that New Zealand is the only country in the world with a huntable population of tahr, Mr Telford emphasises the importance of it being maintained. Mr Telford has completed a short reply affidavit, also taking issue with some aspects of the evidence for DoC.

For DoC

[21] Affidavits have been completed by:

- (a) Mr James Holborow, who is the leader of DoC's tahr programme based in Christchurch. He deposes to the recent history of the extent of culling of tahr and monitoring of the issue by DoC. He has been involved in interviews with stakeholders about the proposed 2020-2021 plan and expresses the opinion that the extent of culling likely to occur will have little impact because the most important hunting activity is not in national parks where he predicts culling will have the most impact. Mr Holborow considers that the substantial injury to the industry claimed by the Foundation's deponents will not occur.
- (b) Dr Benjamin Reddiex who is DoC's director of operations for issues and programmes. He responds to the criticisms raised in the proceeding and expresses his views on DoC's obligations to undertake culling in the current year. Dr Reddiex deposed that if DoC was unable to begin operations shortly, the current year's efforts would be frustrated and would result in a further increase, rather than effective reduction, in the population.
- (c) Mr Peter Lawless, who is an independent consultant of Nelson, retained by DoC to facilitate dialogue between DoC and stakeholders on the proposed terms of annual tahr operational plans. He deposes to the extent of dialogue that has occurred in the last two years' engagement

with stakeholders. This year’s engagement incurred delays caused by the COVID-19 lockdown.

The factual context

[22] Understandably, it is difficult to obtain an accurate count of the number of tahr within their feral range. They live in remote and inaccessible areas, and are mobile. Since the 1991 policy was promulgated, it has continued to apply on the premise that a herd of not more than 10,000 tahr should not cause unacceptable impacts on vegetation and other natural values, but that number was presumed to provide “reasonable hunting opportunities”.

[23] Since that policy was articulated, and certainly since 1996, the herd has numbered substantially more than 10,000. There are gaps in the records maintained of the number of animals killed by various means, but DoC does maintain statistics and issues annual reports on control efforts. A summary of its data in Dr Reddiex’s affidavit reflects an annual average over the last 10 years of approximately 4,100 tahr being culled by all forms of control in each reporting year (1 July to 30 June). The total culs by all recorded forms of control for the last five years are:

Year	Total Culls
2015-2016	4,375
2016-2017	4,622
2017-2018	6,729
2018-2019	1,758
2019-2020	10,655

[24] DoC undertook the culling of 56 per cent of that total. Its count in the last five years have been:

Year	DoC Culls
2015-2016	1,835
2016-2017	2,809
2017-2018	4,947
2018-2019	168
2019-2020	7,238

[25] A helicopter crash in October 2018, which resulted in the death of DoC personnel, brought a temporary end to its control activities, which explains the exceptional dip in numbers in 2018-2019. For the Foundation, Mr Hodder QC treated the much higher control count in 2019-2020 as representing a significant element of catch up.

[26] Recent surveys commissioned by DoC have attempted to project the size of the overall tahr herd more accurately.⁵ The first of those reported the total number of tahr on public conservation land in the period between 2016 and 2018 to be estimated at 34,292, representing a 95 per cent confidence interval in a range between 24,777 and 47,461 animals.

[27] The second survey reported total numbers of tahr on public conservation land in the period between 2016 and 2019 to be estimated at 34,478 animals, given a 95 per cent confidence interval in a range between 26,522 and 44,821.

[28] The tension inherent in the relationship between the interests represented by the Foundation and DoC is that, as the commercial hunting industry has grown, it perceives a need for a herd larger than the 10,000 maximum to which DoC is committed. In Mr Telford's opinion, the industry needs a herd of tahr numbering close to 24,000. If that is right, then the industry has grown to an extent that it requires a herd of more than twice the maximum considered appropriate for conservation purposes. That growth may possibly have been encouraged by a lack of resources or inclination on the part of DoC to carry out control of tahr numbers to bring them down anywhere near the 10,000 maximum set in the relevant policy.

[29] A specific example of DoC's response to the wishes of the hunting industry is its agreement (until recently) to hunting interests' requests that DoC culling in national parks would exclude mature bull tahr, which are highly prized as trophies by clients of professional guides.

⁵ D S L Ramsey and D M Forsyth "Estimates of Himalayan Tahr Abundance in New Zealand: Results from Aerial Surveys" (December 2018 and September 2019).

[30] DoC has focused its engagement with commercial and recreational hunters and others interested in tahr management by means of the Tahr Plan Implementation Liaison Group (TPILG), which was established in 1994 by DoC to provide advice to it on implementation of the tahr control plan. It includes representatives of Ngāi Tahu, statutory boards, recreational and commercial hunting, farming, outdoor recreation and Forest and Bird.

[31] Following a pattern of earlier engagements about the terms proposed for annual operational plans, DoC proposed a meeting with TPILG representatives on 24 March 2020 to discuss proposals for the 2020-2021 plan. Documents for such a meeting were circulated on 20 March 2020, but the introduction of COVID-19 level 3 on 23 March 2020 caused the meeting to be deferred.

[32] Dialogue resumed on 21 May 2020, with an email sent by Dr Reddiex to a wide range of stakeholders advising that:

[DoC] want to engage with you and your sector as we plan for tahr management from 1 July 2020 to 30 June 2021.

[33] Twelve interviews were arranged and conducted between 26 May and 8 June 2020. In the course of those interviews, DoC talked to 18 stakeholders about their views on various aspects of the proposed 2020-2021 plan, including by reference to what had and was happening in terms of the 2019-2020 plan. On DoC's view, those interviews tested reactions to proposals that included DoC targeting all tahr in national parks to achieve an effective zero density as required in the 1993 plan, targeting areas outside the feral range to control spread of tahr and targeting areas of high density within management units in the feral range.

[34] On the evening of 16 June 2020, DoC circulated stakeholders with a draft operational plan for 2020-2021, together with supporting papers that included a summary of the results of the interviews that had been conducted. The stakeholders were invited to a meeting on 19 June 2020. From the Foundation's perspective, the detail in the draft plan provided the first indication of the scale of control that DoC was contemplating in the 12 month period that was about to start. Foundation witnesses have deposed that they were shocked when they learnt from the draft

document that DoC was proposing up to 250 hours of helicopter search and control for culling purposes within the feral range. On a working assumption that such operations result in culling approximately 30 animals per hour, the scale of the proposed control would result in a reduction of some 7,500 animals.

[35] The meeting on 19 June 2020 did not result in DoC making any material changes to its proposals. Witnesses for the Foundation who attended say that they were too stunned after receiving the proposed plan just three nights before the meeting to effectively muster opposition to it. They also deposed to a perception that DoC representatives had closed minds on the issues, having resolved to carry through with the proposal as drafted.

[36] On 22 June 2020, the Foundation wrote to the Minister seeking a review of the relevant policy and plan for control of tahr and asking that the draft 2020-2021 plan be rejected. That was followed by a further letter on 23 June 2020 from solicitors for the Foundation giving notice of the grounds for legal challenge that have now been advanced in these proceedings.

[37] The proceedings were commenced on 26 June 2020. Given the formal opposition to the proposed 2020-2021 plan, a decision on its adoption was elevated to a Deputy Director-General of Conservation and formal approval was granted on 30 June 2020.

Grounds for review

[38] The Foundation challenges the decision to adopt the 2020-2021 plan on three grounds. The first is that the decision is ultra vires the Act, as well as being ultra vires the 1991 policy and the 1993 plan. According to the Foundation, the decision contravenes the Act and the delegated instruments under it because they contemplate a primary role for hunters in managing the tahr population. It follows that, when administering the Act, DoC is required to have regard to the on-going economic basis for commercial and guided hunting of tahr. The decision failed to have regard to those interests and was therefore ultra vires the Act and instruments made under it.

[39] The second ground of challenge is that the decision had been made in breach of the Foundation's legitimate expectation that it and its constituent organisations would be afforded meaningful consultation about decisions on managing tahr. Alternatively, that the circumstances in which plans are prepared gave rise to a duty for DoC to consult with them.

[40] The third ground for challenge was that the decision had been made with those responsible for it having asked the wrong questions and made a decision based on insufficient information.

First ground of review – 2020-2021 plan ultra vires the Act, 1991 policy and 1993 plan

[41] Mr Hodder submitted that as a matter of construction of the relevant provisions in the Act, plus the terms of the 1991 policy and the 1993 plan, an operational plan for the control of tahr that failed to have regard to the interests of commercial and recreational hunters would fall outside and accordingly be ultra vires the permissible scope of such plans, which are required to be consistent with the Act and those delegated instruments.

[42] Mr Hodder cited the long title to the Act:

An act to make better provision for the control of harmful species of introduced wild animals and a means of regulating the operations of recreational and commercial hunters, including wild animal recovery hunting using aircraft, so as to achieve concerted action and effective wild animal control.

The need for concerted action arguably requires DoC, in administering the Act, to co-operate with and provide for private sector contributions to wild animal control.

[43] Mr Hodder cited provisions in s 4(2) of the Act,⁶ which require the Act to be administered so as to ensure concerted action (against the damaging effects of wild animals) and to achieve co-ordination of hunting measures. Mr Hodder also focused on the scope of the Minister's general powers in s 5 of the Act,⁷ which empower the

⁶ Set out at [11] above.

⁷ Set out at [12] above.

Minister to make assessments of hunting and hunter influences and other matters concerning the incidence of wild animals and the means of controlling them, as well as powers to co-ordinate activities of land owners and occupiers and others in relation to the control of wild animals. Further, he cited the power to co-ordinate research work to be undertaken by other government departments or organisations, and submitted that all of these reflected a concern for the contribution to the control of wild animals that is able to be made by hunting interests. Arguably, because control of wild animals involves (or even depends on) the involvement of hunting interests, then it follows that those administering the Act must have regard to their interests.

[44] Further, s 8(1) of the Act provides that subject to the provisions of that and any other statute, "... any wild animal may be hunted or killed or had in possession by any person in any part of New Zealand". Mr Hodder treated this as further recognition of the place of hunting in the control of wild animals.

[45] Part 2 of the Act provides for concessions for wild animal recovery operations (WARO) and in s 23 provides a list of mandatory considerations to which the Minister must have regard when considering an application for a concession to undertake WARO. Those considerations include the role of persons engaged in hunting for recreation in achieving the purposes of the Act. Again, Mr Hodder cited that as a further reflection of a parliamentary intention that the Act be administered with the interests of hunters in mind as a significant group in achieving the purposes of the Act.

[46] Mr Hodder sought support for his interpretation of the Act by reference to other statutory provisions. In s 4(2) of the National Parks Act, the detail of the principle for national parks to be maintained in their natural state provides that they are to be administered and maintained, *inter alia*, so that:

- (b) except where the Authority otherwise determines, the native plants and animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be exterminated:

[47] Mr Hodder submitted that the qualification on any obligation to exterminate introduced animals (including tahr), so that the obligation was only one to be achieved "as far as possible", recognised the need for a balancing of interests. In doing so, the interests of the hunting industry and recreational hunters should be acknowledged.

[48] Mr Hodder also sought to draw support for parliamentary recognition of hunting interests that he saw reflected in the Game Animal Council Act 2013. The functions of that Council in s 7 of that Act, and provision for membership of the Council in s 8, arguably recognise the legitimate interests of recreational and commercial hunters. Mr Hodder cited the commentary on the Game Animal Council Bill as reported back from the Local Government and Environment Committee, which included an acknowledgement:

Hunting and conservation are not mutually exclusive. We recognise that many hunters take a keen interest in maintaining and protecting the environment.

[49] Mr Hodder also cited provisions in the 1991 policy as supporting an intention that the Act is to be administered so as to provide for, or at least accommodate, the interests of commercial and recreational hunters. He cited an introductory statement of the purpose of the policy, which begins:

This policy document defines the manner in which Himalayan tahr will be managed by a management regime which ensures that hunting and other control pressure is maintained at levels which provide protection to natural values.

[50] Mr Hodder cited the inclusion of the fourth bullet point in the actual policy,⁸ namely to provide for commercial hunting as a means of maintaining tahr at or below the target levels. Given that the policy provided for DoC to facilitate control where tahr are not being held at or below target levels, he characterised the policy as recognising a primary role for commercial hunting, with DoC's work being a backstop where control by other means did not maintain the herd at or below the target levels. Arguably, those arrangements for control mean that it is important to the operation of the policy that commercial hunting be supported.

[51] Mr Hodder discerned the same provision for commercial hunting interests in the 1993 plan. That included the statement:⁹

Aerial game recovery operators, recreational and safari hunting are identified as the primary means of thar control. Official control will be implemented to prevent dispersal beyond that area defined as the feral range and to limit the population size to below predetermined maxima within identified

⁸ Set out at [14] above.

⁹ Himalayan Thar Control Plan, December 1993 at 2.

management units where this is not achieved by other means. Once achieved the intervention densities set will result in a population size smaller than when this plan was approved.

[52] On Mr Hodder's argument, inconsistently with all those acknowledgements of the importance of the role played by commercial and recreational hunters, the 2020-2021 plan fails to protect, and instead positively harms, their interests. Arguably, DoC was on notice, or ought to have appreciated, that the level of control DoC proposes to undertake will decimate, to the point of threatening the survival of, the commercial tahr hunting industry.

[53] The short answer to all strands of this argument is that the Act, the 1991 policy and the 1993 plan all see the use of various forms of hunting as a means to the end of achieving effective control of tahr numbers. Promotion of the tahr hunting industry, or any statutory obligation to protect it, is clearly not an end in itself. All the provisions Mr Hodder referred to contemplate the presence of commercial and/or recreational hunting as an available means of contributing to the maintenance of reduced numbers of tahr. The part hunters are to play is in maintaining the size of the herd at or below the maximum, which remains at an overall total of 10,000 animals within the feral range. In current circumstances, control is not left to the hunting industry because all projections of the number of tahr are substantially above that maximum. In those circumstances, official control constitutes culling by DoC to get the number down near the 10,000 maximum.

[54] In designing operational plans, DoC may have regard to the impact on commercial and recreational hunters of any particular form of control of tahr numbers that it is considering, but that renders it no more than a discretionary factor which it may take into account. Nothing in the Act or delegated instruments elevates it to a mandatory consideration. Accordingly, there is no basis for challenging the 2020-2021 plan as ultra vires those empowering provisions on the ground that it fails to have regard to the interests of the hunting industry.

[55] This ground of review can be resolved without analysing DoC's rejoinder on the substance of the complaint, namely that the Foundation's concerns at on-going harm to the hunting industry are substantially overstated, and that, on DoC's analysis,

the level of cull proposed for the 2020-2021 year will not threaten the viability of the commercial hunting industry.

Second ground of review – inadequate consultation

[56] The Foundation alleges that DoC had a duty to consult it, or the TPILG, or the constituent interests it represented, as a matter of fairness, reflecting the primary position occupied by commercial and recreational hunters in controlling tahr numbers. Alternatively, or in an overlapping obligation, Mr Hodder submitted that the recognised position of hunting interests and the pattern of past dealings on plans for control of tahr gave rise to a legitimate expectation that meaningful consultation would occur before decisions were made on operational plans.

[57] DoC denied any formal obligation to consult. There is no such provision in the Act. Alternatively, any legitimate expectation of consultation was adequately discharged by the exchanges that occurred.

[58] The parties took divergent views on a number of factual matters that are relevant in assessing the context in which any legitimate expectation of consultation might arise, and on the scope of interaction required for DoC to discharge any such obligation.

[59] As discussed at [34] and [35] above, the Foundation asserted that when its representatives were first exposed to the proposed level of control (250 hours, assumed to involve the cull of 7,500 animals) in the draft plan distributed on the night of 16 June 2020, that came as a complete shock.

[60] The Foundation contrasted the 250 hours for the year about to commence against the 80 hours that had been provided for in the 2019-2020 plan. They took from that the prospect that the cull would be about three times more than in the previous year and hence their view that it foreshadowed a drastic change.

[61] Mr Laurenson argued that a comparison on that basis was misleading. Eighty hours for the 12 months to the end of June 2020 was considered by DoC to be all that was necessary, given the extensive control activity in the earlier part of calendar year

2019 that was not included in the 80 hour figure for the period from 1 July 2019 to 30 June 2020. In describing the continuity of DoC's approach to tahr control, Mr Laurenson argued that the better comparison was between the numbers culled in the 2019-2020 year (7,238) against the likely cull to result from 250 hours in the ensuing 12 months of some 7,500.

[62] DoC denied that the projected number to be culled would have come as a surprise. Further, that the number likely to be culled does not represent any dramatic increase on the level of cull undertaken by DoC in the 2019-2020 year. Rather, it is no more than an incremental progression. Mr Laurenson acknowledged that the numbers presented by Dr Reddiex reflect certain anomalies because of the different start and end points of the annual periods for which its figures were produced, and conceded there was an element of "catch up" in that period after cessation of DoC culling activities for a period in the 2018-2019 year. However, he maintained that the extent of the proposed cull was in line with the extent of DoC's activities signalled in the previous year's plan, which had been the subject of considerable dialogue with interests represented by the Foundation.

[63] Further, Mr Laurenson argued that the total numbers of tahr culled in recent years included not insignificant contributions from various categories of hunters, which activities were most unlikely to be replicated on the same scale in the current year given limits on movement imposed by the COVID-19 lockdown. In addition, the control action would only take place on public conservation land. Some 19 per cent of the feral range is not controlled by DoC and Mr Laurenson referred to statistics suggesting that a material amount of commercial hunting occurred on private land, which would be unaffected by DoC's activities.

[64] The Foundation called in aid a similar criticism of inadequate consultation publicly announced by the chair of the Game Animal Council.¹⁰ Although no one from that organisation produced an affidavit, Mr Duley appended to his affidavit in reply a media announcement attributed to the chair of the Game Animal Council reporting his extreme disappointment at "DoC's failure to carry out meaningful consultation with

¹⁰ The statutory position of this Council is described at [48] above.

the hunting sector when it comes to managing tahr”. The item reflects a view that two days between advice as to the control measures planned and the meeting about them was quite inadequate.

[65] In *Comptroller of Customs v Terminals (NZ) Ltd*, the Court of Appeal addressed how the existence of a legitimate expectation might be assessed.¹¹ Although in the context of a legitimate expectation as to substantive treatment rather than process, the inquiry as described there is appropriate in present circumstances:

[125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.

[126] The second is to determine whether the plaintiff’s reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

[127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[66] I am mindful that the onus in making out a legitimate expectation should be a meaningful one. As observed in *Te Heu Heu v Attorney-General*:¹²

It is important that the Courts do not quickly find a willingness to talk is deemed to have given rise to a legitimate expectation when all it has done is demonstrated an openness of process and a willingness to be receptive to ideas.

[67] DoC’s operational plan for the period October 2018 to August 2019 recorded that the plan to control tahr was:

... based on consultation between [DoC] and all members of the [TPILG]. Not all members will agree with all aspects of this plan.

It was described as one of a series of annual plans:

... in which a phased approach of concerted control effort is taken to, over time, reduce the tahr numbers to get within the parameters of the [1993 plan].

¹¹ *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

¹² *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) at 127.

[68] The principles on which the plan was said to be based included “partnership”, “a phased and adaptive management approach” and “information sharing”.

[69] That plan recorded that a meeting was to be held with TPILG:

... in July 2019 to review DoC and stakeholder control efforts between October 2018-June 2019. After the meeting DoC may reset the work programme to achieve the control figure of 10,000 tahr by 30 August 2019.

[70] A set of prompts used by Mr Holborow in the stakeholder interviews he conducted in late May and early June 2020 had a checklist of topics that he confirms were raised at each of those meetings. The bullet points included:

- We couldn’t engage with you as we wanted to.
- Like to understand what’s happening from your perspective before we get into the detail.

Those items are consistent with the nature and extent of consultation that Foundation deponents suggest they were expecting.

[71] Although DoC does not in any direct sense blame the COVID-19 lockdown for adversely affecting the extent of consultation it was able to undertake, I am prepared to infer that consultation of at least the scope that was undertaken would have occurred over a longer period, had the extent of dialogue not been constrained by the COVID-19 lockdown. There is no explanation as to why substitute formats of meetings or interviews by Zoom or Skype were not put in place, as quickly became the norm during the lockdown.¹³

[72] The long-standing existence of TPILG and the pattern of consultation between DoC and interested parties in recent years, plus the proposal for consultation that was disrupted by the COVID-19 lockdown, cumulatively provide a sound basis for claiming a legitimate expectation of meaningful consultation about the content of the 2020-2021 plan.

¹³ An internal DoC email from Mr Holborow on the evening of 20 March 2020 contemplated Zoom meetings would occur, introducing the potential to meet more often. There is no evidence why that did not occur.

[73] DoC's practice of engagement reflects the position that hunting interests have under the 1991 policy and the 1993 plan. The retention of Mr Lawless as a facilitator, the preparation of talking points used by Mr Holborow and the extent of the process that was to have occurred when arrangements were made for meetings in March 2020 all contribute to the creation of a legitimate expectation. That is particularly so given the practice of involving TPILG in identifying who should receive consultation materials from DoC.

[74] Mr Laurensen submitted that the adequacy of consultation should not be measured solely on the exchanges in May and June 2020 when, on DoC's view, it was a continuation of dialogue conducted over recent years. However, I am persuaded that the draft conveyed to stakeholders on 16 June 2020 was reasonably seen by them as a step change, so that more time than two days was required to reasonably prepare their response.

[75] It follows from this reasoning that on the second step listed by the Court of Appeal in *Comptroller of Customs*, the Foundation's reliance on a practice of consultation was legitimate.

[76] A specific aspect of the Foundation's complaints at the adverse impacts of the decision is the change of stance by DoC about targeting bull tahr in national parks. Until now, DoC has respected the wish of commercial hunting interests that mature bull tahr in national parks not be targeted in any culling activity, so as to leave them available for trophy hunters. The new plan provides for targeting of all tahr in national parks and the Foundation complains that it had no warning of that change of stance on DoC's part, leaving it without an opportunity to prepare and present argument against such a change.

[77] I accept the effect of Mr Holborow's evidence, and particularly the list of talking points for the interviews he conducted in late May and early June 2020, that at the latest this stance was signalled during the course of those interviews. The meeting notes included at two points:

All tahr in parks

... **at this point our plan is to target all tahr in national parks**

Given the prominence in his meeting notes of that item, I am satisfied it is an item of which warning was given to the interviewees during those interviews.

[78] On the other hand, I accept that the organisations and individuals involved in dialogue with DoC were not advised of the scale of the culling activity proposed by DoC for the year from 1 July 2020, until they received the draft of the operational plan during the evening of 16 June 2020. I do sense an element of overstatement in their claims as to the extent of departure from recent DoC practice represented by the proposed 250 hours, and accordingly a similar overstatement in the extent to which it represented an unexpected surprise. However, I do accept that the manner in which that critical ingredient of the proposed plan was conveyed left hunting interests with inadequate time to make a full response on the implications of the extent of culling that was proposed at the meeting two days later on 19 June 2020.

[79] Accordingly, on the second ground of review, I find that there was a partial inadequacy by DoC in the steps it took to meet that obligation. I return below to the third of the steps as provided by the Court of Appeal in *Comptroller of Customs* when considering legitimate expectation claims, namely what, if any, remedy is appropriate for the extent of the breach. I do so after considering the third ground of review.

Third ground of review – DoC asking the wrong question and being inadequately informed

[80] The Foundation pleading is to the effect that a lawful decision could not be arrived at without questions asked including those along the following lines:

- Would a decision to adopt the plan be consistent with and promote the various purposes of the 1991 policy and the 1993 plan?
- Was there any relevant and compelling reason for departing from the forms of implementation of the 1991 policy and the 1993 plan in previous operational plans, when settling the 2020-2021 year?

- What would the consequences of adoption of such a plan be for the stakeholders who had previously assisted in the implementation of the 1991 policy and 1993 plan by way of commercial and guided hunting activities?

[81] This ground of challenge relies on authority including *CREEDNZ Inc v Governor-General* in which the lawfulness of a decision made in exercise of a statutory power may not be upheld if the decision-maker was inadequately informed, including not asking the right questions to enable a decision to be made on relevant criteria.¹⁴ This ground of challenge overlaps, and to an extent depends upon, the Foundation making out at least some elements of the earlier two grounds for review. For instance, the implicit requirement for the 2020-2021 plan to be consistent with the purposes of the 1991 policy and the 1993 plan becomes a relevant criticism if the Foundation makes out that protection or promotion of the interests of commercial hunters is a part of the purpose or object of the Act and the 1991 policy and 1993 plan. I have held that not to be the case.

[82] In any event, the opposition to the plan by interests represented by the Foundation on the ground that it will jeopardise the viability of their businesses was acknowledged as a concern, although not accepted as the correct position.

[83] As to the second question arguably required to be considered by the decision-maker, DoC submitted that consistency from one year to the next was not a requirement for a lawful decision to adopt an operational plan. The relevant issue for the decision-maker is to decide how the control plan is to be put into operational effect in all the circumstances as they appear at the time.

[84] The third question, like the first posed in the Foundation's pleading, depends on the premise that a relevant statutory concern arose for the well-being of the commercial hunting industry. In the absence of that as a mandatory relevant consideration under the Act or the 1991 policy and 1993 plan, the absence of a question by the decision-maker as to the consequences that were likely to be caused for the

¹⁴ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

commercial hunting industry cannot be treated as a relevant consideration that was overlooked.

[85] I have reviewed the paper put to the Deputy Director-General, which concluded with the recommendation that he adopt the 2020-2021 plan. All the issues seen as relevant by DoC, including opposing views of hunting interests, were adequately canvassed. Accordingly, the third ground for review cannot be made out.

Targeting bull tahr in national parks

[86] I see DoC's obligations in effecting control of tahr in national parks as subject to the additional standard which requires it to seek extermination of tahr within the national parks "as far as possible". I am not persuaded that there is any relevant circumstance that requires DoC to exempt bull tahr located within national parks, on the grounds that their culling is any less "possible" than the culling of other tahr.

[87] Further, to the extent that a measure of relief is warranted because of inadequate opportunity for consultation, the same cannot be said of the discrete criticism by the Foundation that DoC is changing its policy, which has previously respected the concern of hunting interests that the shooting of trophy bull tahr should effectively be left to them. As I have found, Mr Holborow's interviews flagged this change and those interviewees represent a sufficient cross-section for the interests represented by the Foundation to be on notice that they were likely to lose the dispensation that previously applied unless they persuaded DoC otherwise. There was ample time to prepare a submission on that aspect before the meeting on 19 June 2020.

Relief

[88] Returning then to the prospect of a remedy for the extent of DoC's failure to provide a meaningful opportunity for consultation about the level of culling it was proposing, I am satisfied that quashing the decision to adopt the plan would be disproportionate and is not warranted.¹⁵ There is no doubt that the Deputy Director-General was lawfully entitled to decide that the proposed operational plan for 2020-

¹⁵ Compare *Lower North Island Red Deer Foundation Inc v Minister of Conservation* [2017] NZHC 1346 at [82]–[83].

2021 should be adopted in terms of the recommendation made to him. There is no claim here of unreasonableness of the substantive decision in an administrative law sense. The part of the Foundation's complaint that I have upheld relates to the adequacy of the process adopted by DoC in arriving at the decision to adopt the plan.

[89] There is some urgency in clarifying the entitlement of DoC to conduct the culling operations required to carry out the plan. Helicopter culling operations are weather dependent and there is a concern to have the operation completed before November when this year's group of new tahr are due to be born.

[90] There remains a substantial difference between the parties on the adverse impacts on the business interests of commercial hunters that will follow from the 2020-2021 plan being carried into effect. I am left with a residual concern that the extent of harm to commercial hunters' interests claimed by deponents for the Foundation relies on an expectation of a herd size materially larger than the overall maximum provided for in the 1991 policy and 1993 control plan. Mr Hodder sought to deflect such concerns by submitting that the Foundation does not resist a move towards a total herd of 10,000 tahr, but the Foundation's concerns are at the inadequacy of the opportunity given to the interests represented by the Foundation to debate preferable means of achieving that outcome, and the relative speed with which it ought to be achieved. The latter consideration implicitly acknowledged the prospect that the commercial hunting industry may have to downsize, but that a staged adjustment over time is likely to lead to far less economic and personal hardship than the Foundation sees resulting from what it treats as a precipitous drop in the number of tahr.

[91] Partial relief was not contemplated by counsel in their submissions, but ss 16 and 17 of the Judicial Review Procedure Act 2016 afford a breadth of powers to tailor remedies to reflect the nature of breach of lawful obligations, and the scope of legitimate interests of those seeking relief.¹⁶

[92] I accordingly direct as follows:

¹⁶ *Waimea Nurseries Ltd v Director-General for Primary Industries* [2018] NZHC 2183 at [90].

- (a) DoC is to reconsider its decision to proceed with the 2020-2021 plan after consulting with interests represented by the Foundation and other stakeholders.¹⁷ DoC is to give not less than seven days' notice of the mode and timing of a meeting or meetings at which such consultation is to occur and is to provide no less than five days' notice of any new material DoC intends to take into account on its reconsideration.
- (b) The scope of the consultation obligation is as defined by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*.¹⁸
- (c) DoC is to produce a reasoned decision reflecting its reconsideration for either amending aspects of the 2020-2021 plan, or providing reasons for not doing so.
- (d) Until consultation and a further decision have been completed, DoC is not to undertake more than one half of the 250 hours provided for in the 2020-2021 plan.
- (e) This constraint on the number of hours has no impact on control measures outside the feral range. The hours up to 125 that can occur before the issue of DoC's decision on its reconsideration may be allocated as DoC sees fit across the seven management units. There is no constraint on the types of tahr that may be controlled within national parks.
- (f) Subject to the extent of constraint described, I confirm under s 17(6)(a) of the Judicial Review Procedure Act that the decision, the subject of challenge in these proceedings, is to continue to have effect in all other respects unless and until it is amended or revoked.

¹⁷ Those offered the opportunity to be consulted should include at least the list of addressees of Dr Reddiex's 21 May 2020 email at 22-23 of the exhibits to his affidavit.

¹⁸ *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 683–684.

Costs

[93] I will receive memoranda if the parties cannot agree. My provisional view is that the Foundation has justified costs at a relatively modest portion of 2B scale, given the extent to which DoC has successfully refuted challenges on a much wider basis.

Dobson J

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