

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER Mackenzie District Plan
Proposed Plan Change 13
Rural Zone-Mackenzie Basin

**STATEMENT OF EVIDENCE OF JENNIFER MILLER ON BEHALF OF THE
DIRECTOR GENERAL OF CONSERVATION**

Dated: 11 September 2008

**DIRECTOR GENERAL OF
CONSERVATION
DEPARTMENT OF CONSERVATION**

Torrens House
Level 4, 195 Hereford Street
Private Bag 4715
CHRISTCHURCH 8140
Tel 03 371 3700
Fax 03 365 1388

1. Qualifications and Experience

- 1.1 My full name is Jennifer Ruth Miller. I am a Resource Management Planner with the Canterbury Conservancy of the Department of Conservation.
- 1.2 I hold a Bachelor of Landscape Architecture (Hons) from Lincoln University and I am completing a Masters Degree in Landscape Planning also at Lincoln University. I have four years experience practicing in resource management planning at the Department.
- 1.3 I have been involved in submissions and subsequent hearings and negotiations on landscape provisions for both the Selwyn and Banks Peninsula District Plan.
- 1.4 I am generally familiar with the Mackenzie Basin having visited the area many times, although not in a professional capacity, and have visited the Basin during the preparation of this evidence.
- 1.5 I have read the Code of Conduct for Expert Witnesses and have prepared my evidence in accordance with the Code and agree to comply with it. This evidence is within my area of expertise, except where I state that I am relying on facts or information provided by another person.

2. Director General's Submission

- 2.1 The Director General of Conservation submitted in support of the purpose of the MacKenzie District Councils Proposed Plan Change 13 (PPC13). It was considered that the PPC13 had correctly identified that sporadic subdivision and development can have an adverse and accumulative effect on the unique landscape values of the District, in particular the impact on native plants and fauna and ecological patterns that contribute to the outstanding natural landscape. The general principle that future residential development should follow the current land use pattern was supported.
- 2.2 However his submission raised concerns in relation to the **Appendix R** 'Capacity for New Nodes' attached to PPC13 and the extent to which such a map gave effect to the proposed Objectives and Policies of PPC13. The submission also considered that

there should be more stringent rules applied to the margins of lakes and rivers to give effect to section 6 (a).

3. Outline of evidence

3.1 I am aware that there has been considerable evidence presented at this hearing to date. This evidence will discuss issues that are particularly crucial to the Department and matters raised in some of the evidence already presented as it relates to these issues.

3.2 My evidence will discuss my own understanding of the terms natural, natural character and the importance of assessing the scale of outstanding natural landscapes, relying on what has been accepted in case law over time. I will discuss whether nodal development can be an appropriate planning mechanism to protect outstanding natural landscapes and the extent to which the identification of new nodes as having capacity for further development gives effect to Part 11 matters RMA.

3.3 I am aware that there have been several submissions and evidence presented at this hearing seeking that PPC13 be withdrawn. I do not support this view. I consider the approach being proposed by the Council is a valid landscape management approach, albeit novel and requiring some improvement. It is hoped that this evidence will provide some assistance to the Commissioners in reaching a decision on what can often be highly contentious issues within communities.

4. Introduction

4.1 In his review of RMA case law developing around the concept of outstanding landscape Professor Barry Barton notes that the reason for most Environment Court cases now seems to stem from the pressure to allow “lifestyle developments – large houses on lots of several hectares outside urban limits.”¹ These types of developments are illustrated by the subdivisions that have taken place west of Twizel, although, arguably, the full extent of landscape change has yet to occur. The vulnerability of the Mackenzie Basin landscape to this type of change derives from its predominantly expansive character which means that every single dwelling in the wrong place can negatively impact on the natural character of broad areas of landscape.

¹ P. 85 in Barton, B (2006) Outstanding Landscapes. *Resource Management Theory & Practice*. Pp 84 -156

4.2 Professor Barton concludes that the substantive merits of the law concerning landscape hinge on “whether the right landscapes are getting the right protection, and whether development is being allowed where it is right. These questions are not susceptible to ready answer, especially as little monitoring of landscape values is carried out.”² The question before this hearing relates closely to this issue and in addressing this matter it is necessary to deal with questions relating to the definitions of ‘natural’ and ‘outstanding’ that have evolved in case law.

5. Natural and Natural Character

5.1 The earliest discussion of the meaning of ‘natural’ occurred in s 6(a) coastal cases, the most cited of which is *Harrison v Tasman District Council*:

*The word “natural” does not necessarily equate with the word “pristine” except insofar as landscape in a pristine state is probably rarer and of more value than a landscape in a natural state. The word natural is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and many other things of that ilk as opposed to man-made structures, roads, machinery etc.*³

5.2 The *First Queenstown Landscape Decision*⁴ agreed with *Harrison* and added:
We consider that the criteria of naturalness under the RMA include:

- *The physical landform and relief;*
- *The landscape being uncluttered by structures and/or “obvious” human influence;*
- *The presence of water (lakes, rivers, sea);*
- *The vegetation (especially native vegetation) and other ecological patterns.*

² P.145 in Barton, (2006)

³ C193/1994 para 197

⁴ C59/2000 para 88

The absence or compromised presence of one or more of these criteria does not mean that the landscape is non-natural, just that it is less natural. There is a spectrum of naturalness from a pristine natural landscape to cityscape.

- 5.3 The first bullet point of this definition has been recently modified in *Long Bay-Okura Great Park Society v North Shore City Council*⁵ to read “relatively unmodified and legible physical landform and relief.” It is clear from case law development that the Courts have not sought to eliminate all but those landscapes which are extremely close to pristine from consideration, but rather has sought to provide tools so that landscapes may be assessed on a case by case basis.
- 5.4 Dr Steven’s stated in his para 12 that when “assessing natural character the scale that is being used should be made explicit”, however that scale needs to reflect current case law, whereas Dr Steven’s suggests a close correspondence between pristine and natural that is somewhat misleading in relation to case law. His approach was not accepted in *Briggs and ors v CCC* where the Court felt that Dr Steven’s scale of natural character “may lead to an overemphasis on indigenous vegetation cover as the *sine qua non* for a level of natural character requiring protection”.⁶
- 5.5 It is the legibility and expansive nature of the relatively unmodified outwash gravels, and other glacial features and geomorphology that have remained largely undeveloped, that have allowed indigenous plant communities (mainly short tussock grassland and shrubland) to retain a relatively high degree of naturalness. This has meant the majority of the Mackenzie Basin landscape also has retained a high degree of naturalness. Of course, there are areas of far greater human modification near settlements or where land use has intensified. There are also changes due to hydro development, however these are quite intermittent and do not significantly detract from the over-riding landscape character of being an expansive natural landscape. Although development for hydro electricity has brought about considerable changes to the landscape the majority of these follow the contour and have largely been re-integrated into the existing landscape. They affect the natural character of only a small proportion of the Mackenzie Basin.

⁵ A078/2008 para 135

⁶ C/45 2008 para 145

- 5.6 In his evidence Dr Steven states that because natural character is independent of whether it is valued by communities “the degree of natural character can be assessed objectively and methodically with reference to natural processes, natural elements, and natural patterns, and the extent to which these aspects have been modified by human intervention.”⁷ However, landscape character assessment is not a natural science (in the sense that you can objectively measure temperature or weight, for example), but rather it reflects the emphasis you might, for instance, place on a fenceline and how significantly it might detract from the naturalness of an area. The type of fence (for instance, 4m prison fence or rusted 7 wire post and batten fence will definitely have different effects on the landscape, but those effects are not objectively quantifiable) and terrain will play an important part in the assessment but as it is humans who are doing the assessing they will to some extent include their own prejudices about the effects of any given intrusion in the landscape, and therefore, at best assessment of naturalness can only be relatively objective. You can state that the fence is there objectively, but not what effects it will have on naturalness, primarily because of the variability of scale – regular rectangular paddocks on the Canterbury Plains are completely different to the occasional fence with short tussock grassland on either side, as might be experienced in the Mackenzie Basin.
- 5.7 Dr Steven refers to the work of Swaffield and Foster 2000 to say that they “identify expert evaluations of overall ‘naturalness’ as an example of insensitive methods applied to landscape assessment.”⁸ In fact Swaffield and Foster 2000 say that “expert approaches are limited in their sensitivity, by the nature of the categories that are *typically* used for the evaluation. Describing a landscape in terms of overall ‘naturalness’, for example, could disguise a wide range of detailed variations in ecological modifications.”, (my emphasis added)⁹ In his assessment of the vulnerability of landscape character areas Mr Densem is implicitly making an assessment of their naturalness and the effects that subdivision, use and development might have on that character. For example, he notes that the “Raised uplands are uniformly very vulnerable to change due to their wide visibility over long distances

⁷ Steven (2008) para 25

⁸ Steven (2008) para 29

⁹ Swaffield and Foster (2000)

and very high levels of naturalness.”¹⁰ Conversely he notes that recent airport development near Twizel has successfully eliminated “any semblance of high country or Mackenzie character.”¹¹ Mr Densem does detail the variations in naturalness and modifications in each of the landscape areas which is why only small areas within the broader landscape are deemed low vulnerability to change. An expert assessment is not necessarily insensitive to degrees of naturalness; the sensitivity depends on the nature of the categories that are chosen for an assessment, however Mr Densem could be more explicit in his assessment about the underlying levels of naturalness within the landscape character areas.

5.8 In his evidence Dr Steven states following the Banks Peninsula decision,¹² that to view the Mackenzie Basin as a “natural landscape is the product of a similar conceit of the mind that conveniently overlooks the modifications wrought through massive engineering interventions for infrastructure development, and more than 100 years of landscape changes through development for pastoral farming.”¹³ However, the comparison is misleading because the two landscapes are not remotely similar in landform or their histories of land-use change. Banks Peninsula is a highly dissected volcanic landform that has had the majority of native forest cover removed, over-sowing with cocksfoot, numerous woodlot and forestry blocks planted, and a far greater number of dwellings and sheds built away from major settlements. Conversely, the Mackenzie Basin has vast areas where none of these alterations has occurred because of the extensive nature of the pastoral farming that has occurred until very recently.

5.9 At the start of paragraph 84 that Dr Steven quotes from the Banks Peninsula decision, Judge Smith makes it clear that his judgement is based on the circumstances of the actual landscape; “it is clear from the photographic and other evidence given to this Court, and from our site visit, that there are already a great many buildings and forestry blocks on the ridges and spurs of Banks Peninsula. One of the unfortunate consequences of being a member of the Court is that repeated analysis of landscapes

¹⁰ Densem(November 2007) para 3.38

¹¹ Densem (November 2007) para 3.81

¹² *Briggs and ors v Christchurch City Council C45/2008*

¹³ Stevens (2008) para 36

leads to critical evaluation of landscapes that may be taken for granted.”¹⁴ Merely listing the changes, as Dr Steven does, wrought by pastoral farming and hydro infrastructure does not provide a critical evaluation of whether it is a conceit of the mind to view the Mackenzie Basin as having a high degree of naturalness.

6. Outstanding Landscapes

6.1 One of the key difficulties with assessing what should be considered an ‘outstanding’ landscape is what the appropriate comparison should be. Initial case law on ‘outstanding’ developed in relation to Water Conservation Orders but these are;

*notified and considered on a national basis, while the only immediate comparison that a consent authority has is with its own district or region. So the use of ‘outstanding’ in relation to landscape depends on what authority is considering it; a district council must consider what is outstanding in its district. But the Court recognized that this could be an ill-defined restriction, since our mental view of landscapes is conditioned by our memories of other real and imaginary landscapes in the district and elsewhere. Some districts might have many outstanding natural landscapes, some might have none.*¹⁵

6.2 Because individual districts must be assessed on their merits it is not helpful to make comparisons with the amount of ONL protected in other districts. Specifically, Dr Steven argues that because the Court refused to accept the proposition that 70,000 ha or approximately 70% of Banks Peninsula should not be identified as ONL, then an area at least twice the size of Banks Peninsula should not be identified as ONL in the Mackenzie Basin: “Consistent with the Banks Peninsula decision, I cannot accept that a highly modified agricultural landscape the size of the Mackenzie Basin can be deemed to be outstanding in its entirety.”¹⁶ The consistency needs to be with the careful approach (undertaken for Banks Peninsula) in assessing whether the Mackenzie Basin landscape is or is not ‘highly modified’, as Dr Steven claims, and

¹⁴ *Briggs and ors v Christchurch City Council C45/2008* para 84

¹⁵ Barton (2006) p.100

¹⁶ Steven (2008) para 79

not with regard to the proportion of the District that may or may not be identified as ONL.

- 6.3 In paragraphs 42 and 43 Mr Kruger proposes a sensible way of clarifying whether the Mackenzie Basin as a whole is a natural landscape and if it is, is it outstanding, and following on from this, “does the Mackenzie Basin contain natural landscapes and if yes are these - or some of these outstanding natural landscapes.”¹⁷ Like Mr Kruger, without having undertaken a comprehensive study of the landscapes in question it is difficult to make definitive statements, however I would also agree with him that “it’s immediately apparent that the Basin – and the district for that matter – contain some highly valuable and natural landscapes, some of which have been previously identified.”¹⁸ The questions that flow from that statement are; what is the extent of the ONL, and therefore what planning mechanism is most suitable for protecting that ONL from inappropriate subdivision, use and development? Determining the extent of the ONL suitable planning mechanisms highlights the issue of scale.
- 6.4 The issue of scale has been addressed in the *Glendhu Bay* decision where the Court argued that it was necessary to have some concept of scale in defining landscapes, offering some quantitative standards, including an area of at least 600ha, reluctantly but also cautioning “that it appears to us:
- that the more open a landscape is, the greater the area it must contain to be seen as a landscape.”¹⁹
- 6.5 However, any quantitative measure of scale should only be seen as suitable “in the district.”²⁰ Scale can be seen as an objective measure compared with the other elusive qualities that constitute landscapes; “But it is not fixed. To read the *Glendhu Bay* decision properly requires us to remember the breadth of the vistas of the inland South Island. It would never do for the more enclosed landscapes of, say, inland Taranaki or the Coromandel”²¹ It is arguable that the Mackenzie Basin has even more expansive vistas than those around Wanaka.

¹⁷ Kruger (2008) para 43

¹⁸ Kruger (2008) para 45

¹⁹ *Wakatipu Environment Society v Queenstown Lakes District Council (Glendhu Bay)* C289/2003 para 20

²⁰ *Hahei Developments Ltd v Thames Coromandel District Council* C176/2003 para 29

²¹ Barton (2006) p.105

6.6 In a large scale landscape like the Mackenzie Basin, with variable degrees of naturalness, the choice^{include} when identifying ONL areas is between a) identifying very large areas as ONL while excluding small areas within the greater ONL that clearly do not meet threshold, or b) selecting smaller areas within the broader landscape to designate as ONL and giving some other classification to the bulk of the landscape. It is my opinion that in the Mackenzie Basin landscape, because of its scale, its clearly expressed landforms and large tracts of relatively unmodified (although degraded) indigenous plant communities in comparison to the extent of areas that are more highly modified, that the former method of ONL identification is likely to be most useful. As the Court noted when discussing the Kaipara Harbour; “There is an interconnectedness throughout this part of the harbour and its shoreline and hinterland having regard to the above factors, that cannot be compartmentalised in the way that was attempted”²² Although this case was discussing a s. 6(a) matter the relevant point is that in expansive landscapes there is an interconnectedness that is hard to compartmentalise.

7. Nodal Development

7.1 In Goodwin et al’s (2000) study published by the Ministry for the Environment entitled “*The impact of rural subdivision and development on landscape values*” the authors outline 13 statutory planning techniques and 4 non-statutory planning techniques for dealing with the impact of rural subdivision. Under “Technique 8 *Identification of Special Areas*” they note that;

Many plans identify parts of their rural areas where the community has made a judgement that:

- development needs to be carried out in an especially sensitive way because of the vulnerability of the landscape values of the area to detract from the impacts of development (these are variously known as ‘outstanding natural features and landscapes’, ‘significant landscapes’ etc.²³

²² *South Kaipara Harbour Environment Trust v Auckland Regional Council* A45/2006 para 60

²³ Goodwin, J., deLambert, R., Dawson, S., McMahon, S. and Rackham, A. (2000) *The impact of rural subdivision and development on landscape values* Ministry for the Environment ME 354 p. 49

7.2 The proposal under PPC13 to allow ‘approved building nodes’ instead of sporadic subdivision fits with the practice outlined by Goodwin et al. (2000) as “clustering techniques” which attempt group allotments within the broader unmodified landscape which “means that large rural open-space areas are retained while still accommodating residential activities. The blanket character of general rural subdivision can thus be avoided.”²⁴ Under disadvantages Goodwin et al. note that clustering “will not always be the most suitable pattern of subdivision in terms of the ability of the landscape to absorb development without adverse effects.”²⁵ However, in the case of the Mackenzie Basin, I agree with Dr Steven and “regard the proposed policy on ‘nodal’ (or cluster) development as having some merit.”

7.3 However these nodes need to be carefully assessed to provide certainty to any landowner contemplating development and to assist Council planning staff to consider whether any proposal is consistent with the Plan.

8. Appendix R-“Capacity for New Nodes’

8.1 **Appendix R** attached to the PPC13 and referred to as **Map 8** in Mr Densem’s landscape assessment, identifies areas he considers capable of new development, along with an indication of the maximum number of additional nodes that the Council might contemplate ‘throughout the Basin without prejudicing the existing landscape character and values.’²⁶

8.2 However in my opinion Appendix R is less than helpful in providing any assistance to a landowner as to where they may develop land for residential purpose and indeed may undermine the primary objectives of PPC13, i.e to protect the landscape characteristics of the Mackenzie Basin, (as described in para 3.18 of the landscape assessment), from inappropriate and sporadic subdivision use and development and to encourage development where it will not compromise these values.

²⁴ Ibid p.51

²⁵ Ibid p.52

²⁶ Densem (2007) para 5.45

- 8.3 It is clear from reading the landscape assessment Mr Densem's considers that there will be limited scope for the development of new nodes, and in his view Council 'should be very judicious and measured in allowing new nodes'²⁷. I agree with this statement. However this view does not appear to be reflected in Appendix R as it identifies vast areas where a specified number of new nodes may be developed providing Council is satisfied any proposal meets criteria set out in Policy 3G. Many of these areas have little in the way of existing infrastructure and within highly natural areas. These areas also include Conservation land, land designated for military purposes, the flood plain of the Pukaki River and areas identified as being Significant Natural Areas in the District Plan. It also effectively lessens the areas where development should not be contemplated (marked X) when compared with his Map 7.
- 8.4 In his Map 7 Mr Densem has assessed each Landscape Character Area's ability to absorb development and this appears in my opinion to be a more helpful map. Areas have been assigned High, Medium to Low vulnerability to development. 'Low vulnerability' areas according to this assessment are those within the Mackenzie Basin with the highest level of existing development, 'Medium vulnerability' are areas where 'modest or light developments may be considered' and although vulnerable to change are not highly vulnerable as they are less prominent to view or are within existing 'development' such as tree growth or land surface disturbance, (paras 3,112-113). 'High vulnerability' is considered to be areas where development should not be contemplated. Mr Densem states in the Landscape Assessment that there should be a cross reference between his Map 8 in the Landscape Assessment (Appendix R) and Map 7 so specific sites for new nodes can be identified; however this map has not been attached to PPC13.
- 8.5 Policy 3G has a list of criteria and states that "new Building nodes will only be granted as 'approved building nodes'" if these criteria are met to the satisfaction of the Council. While these are reasonable criteria in themselves, if as Mr Densem notes there is limited scope for further development this may not be the impression a landowner will gain from their reading of Policy 3 G. It is easy to see how someone may assume that if all the 'boxes are ticked' approval will be automatic. In other

²⁷ Densem para 5.21

words if the matters are seen as a definitive list of all the relevant factors in assessing new development nodes the Council may find their ability to avoid sporadic development is very limited.

- 8.6 In my opinion it would be helpful for all concerned for Council to carry out a thorough assessment of the areas indicated in Map 8 that clearly identifies areas of vulnerability as in Map 7. If this is not possible through this plan process the information and assessment criteria that informed the development of Map 7 should be incorporated into Policy 3G.

9. Tenure Review

- 9.1 The proposed addition to Rural Issue 7 in PPC13 discusses how the freeholding of former Crown Pastoral Lease land may have the potential to reduce the Basin's 'unspoiled openness and vastness, which are its main attributes' as a result of a potential increase in intensive use of the land.
- 9.2 I note that Ms Vivian in her planning evidence on behalf of Federated Farmers and others refers to the tenure review process in respect to PPC13. Ms Vivian considers that land freeholded as an outcome of tenure review protects the 'significant inherent values' of the land either as a result of it returning to full Crown ownership or other mechanisms such as covenants.
- 9.3 In 2004 the Environment Court considered the relationship between the RMA and CPLA²⁸ Since then however as result of concerns raised about the accumulative impacts tenure review could have, particularly on lakeside areas, and the extent to which rules in District Plans and other mechanisms were providing adequate protection of these now freeholded but important landscapes, the Crown identified lakeside lease properties where it did not favour tenure review proceeding because it was felt important lakeside landscape values could not be satisfactorily protected once land was freeholded²⁹.

²⁸ RMA (A128) /2004

²⁹ Media statement: Hon David Parker Minister for Land Information. 16 November 2007.

9.4 As a result new criteria have been developed where the Crown will enter into tenure review with those properties that have been identified if an agreement between them and the leaseholder can be reached, including the lessee accepting restrictions on the lands future use and development. So while these particular properties will have a greater degree of protection it is up to the community to form an assessment as to whether the tenure review process has successfully protected the District's outstanding landscapes from inappropriate subdivision, use or development

10. Conclusions

10.1 Case law relating to how 'natural', 'naturalness' and 'natural character' is continually being refined to help clarify how these slippery terms should be interpreted. It is clear from the definitions provided by the Court that natural does not equate with pristine, but instead refers to the products of nature. It is the responsibility of those assessing naturalness and natural character to use the definitional tools proposed by the Court rather than provide their own definition of 'natural' that serves their own purposes.

10.2 Assessment of 'outstanding natural landscapes' should be considered at the scale of the district on a case by case basis because some districts may have many outstanding landscapes, while some might have none. Proportions identified as ONL in other districts is not a useful guide because landscapes vary so much between districts.

10.3 If ONLs are identified in the Mackenzie Basin does it make more sense to identify a large area of ONL with exceptions within the ONL for more highly modified landscapes, or attempt delineate smaller ONLs within the broader landscape. Because of the extensive scale and high vulnerability of most landscapes in the Mackenzie Basin to incremental change, I am of the opinion that the identification of a broader ONL is more appropriate to recognise and provide for the outstanding natural landscapes of the Mackenzie District.

10.4 The concept of identifying special areas where development needs to be carried out in an especially sensitive way is common New Zealand practice; however, nodal or clustering of development is less tested primarily because it will only be suitable in some landscapes. In my opinion Mr Densem is right to identify it as the most appropriate method for controlling subdivision in the Mackenzie Basin landscape.

10.5 The identification of areas within the Mackenzie Basin to allow for further development is supported. However Appendix R attached to PPC13 needs to be given the context provided by the criteria that informed the identification of areas vulnerable to development as shown in Mr Densem's Map 7.

Jennifer Miller

11 September 2008

