



A G E N D A

Council

**Wednesday
24 December 2014
10.00 am
Council Chambers**

His Worship the Mayor, M.T. Havill (**Chairperson**)
Deputy Mayor P.M. Cox
Cr. J.H. Butzbach, Cr. M.S. Dawson, Cr. D.G. Hope,
Cr. L.J. Martin, Cr. M.D. Montagu, Cr. C.A. van Beek



EXTRAORDINARY COUNCIL MEETING

NOTICE IS HEREBY GIVEN OF AN EXTRAORDINARY MEETING OF THE WESTLAND DISTRICT COUNCIL TO BE HELD IN THE COUNCIL CHAMBERS, 36 WELD STREET, HOKITIKA ON WEDNESDAY 24 DECEMBER 2014 COMMENCING AT 10AM

Tanya Winter
Chief Executive

19 December 2014

1. MEMBERS PRESENT AND APOLOGIES:

1.1 Apologies.

- Cr M.S Dawson
- Cr D.G Hope

1.2 Register of Conflicts of Interest.

2. BUSINESS:

2.1 Extraordinary Council Meeting to discuss “That Westland District Council confirms its ownership of the Cascade-Hollyford Road as legal road”.

Attached are the following documents:

2.1.1 Report on the Status of the Unformed Road between Cascade Valley and Hollyford Valley. (Pages 3-11)

2.1.2 Tavendale and Partners – Haast Hollyford Highway Limited – The reason why the Cascade-Hollyford Road is accepted as public highway; and The Way Forward. (Pages 12-18)

Report on the status of the unformed road between Cascade Valley and Hollyford Valley

Purpose : To consider the current status of the unformed road line between Jackson River - Cascade Valley Road and the formed portion of Hollyford Road.

This road line spans the boundary between the Westland and Otago Land District and the boundary between the Westland District Council and Southland District Council. These boundaries are illustrated on the diagram marked **A** attached.

1. What the survey records show

1.1 Report to the House of Representatives 1884 :- copy attached marked B

This is a report on reconnaissance surveys in South-Westland the principle objectives of which was "to get a good topographical map of the district and ascertain whether it was possible to get a practicable line for extension of the main road to Martins Bay settlement." The report tabled in parliament included a map which showed a line of proposed road from Arawata – to the Hollyford Valley.

1.2 SO 5690 (Westland); SO 2069 (Otago) :- copy attached marked C

This plan is titled "Topographic Survey of the land between Jacksons River and Hollyford Valley". Within the detail the plan illustrates the lines of roads, coloured burnt sienna. One of these commences on the Cascade Plateau and runs generally southward to a point south of Lake Alabaster in the Pyke Valley. It is labelled – "Proposed Main Road". This plan is included in both Land Districts and is considered to be complete illustration of the 1883 / 84 reconnaissance surveys as reported to Parliament in 1884, and their presentation fits with the specifications set out in the Survey Regulations 1886.

1.3 Roll Plan 1880 (Otago) :- copy of part attached marked D.

This plan records details of the north-western part of Otago Land District, defining Run parcels 455, 472, 473, 474 and 492 for settlement together with topographic information of the area. The plan shows the same road lines as those illustrated on SO 2069 (Otago).

This plan provided the only definition of Runs through the north-western part of the Otago Land District and was the basis for settlement of many on pastoral lease and licence options.

The un-surveyed roads across the whole of Roll Plan 1880 are illustrated in the same manner as the Hollyford and Pyke Valley road lines, and these are the only access options to any of the Run parcels, it is therefore reasonable to construe that all lines of roads displayed on the plan were intended to provide legal access to any of the Run parcels shown thereon whether permanently alienated or not.

It is noted also that the Run parcels remain in the current cadastral survey database and have been used in the description of State Forest and National Park boundaries.

1.4 SO Plans 636, 637, 638 (Otago) :- copies attached marked E1 to E3.

These topographic representations show the existence of a track in the Hollyford Valley on the east bank of the Hollyford and Pyke Rivers to a crossing point near Chair Creek and then following the River banks on to Lake McKerrow.

The track is illustrated on the plans as a sienna coloured lines, either solid or pecked and labelled "track from Wakatipu to Martins Bay". These notations are taken to confirm that the track was used as a 'public highway' albeit only formed as foot or bridle track at that time.

Bridges and some stream crossings are illustrated, which indicate a level of formation or construction.

1.5 SO 639 (Otago) :- copy attached marked F.

The plan is titled "Routes Lake Wakatipu To Milford Sound" it shows these routes bold burnt sienna lines. A route along the east side of the Hollyford River for the extent of its coverage is labelled "to Martins Bay".

The nature of the plan confirms that these were established access tracks and considered to confirm that they were 'public highways'. The plan states it was "Traced from Public Works Plan." It follows that Public Works were fully aware of the position of these roads.

1.6 SO 9109 (Westland) :- copy attached marked G

This plan is titled "Cascade Pyke Valley Road", and was formerly numbered as Roll Plan 2/14. It illustrates a road line from a point adjacent to the Martyr River in the north to a point on Chair Creek, near Lake Alabaster in the south, connecting with a road line annotated as "Road to Queenstown".

The road line is illustrated as red line with centre line pegs shown at mile intervals. The reference panel also indicates that levels were established along the surveyed alignment. The plan bears a certification by the then Chief Surveyor, dated 1973, which confirms it as an official survey record from 1886..

1.7 SO 3147 (Westland) :- copy attached marked H

This is titled "Cascade to Jackson Road" and indicating that it was plotted from Field Book records in 1935. It illustrates a road centre line, apparently pegged. The plan is annotated as linking to Plan 65/25 (SO 81) at the Jackson River end, and to "The Pyke Valley Cascade Road - Roll Plan 2/14" (SO 9109).

1.8 SO 1033 (Westland) :- copy attached marked I

This plan defines Section 2530, Block XI, Cascade District. The survey was approved as to survey in March 1907. The plan shows road frontage on the south and west boundaries, coloured burnt sienna, and this is labeled "Barn Bay Track".

1.9 State Forest

Substantial areas of Westland and Otago Land Districts were set apart as Provisional State Forest by New Zealand Gazette 1919 page 1283 to 1292. This notice described the peripheral boundaries of the various parcels and referenced them as being delineated on Roll Map 450.

1.9.1 Westland :-

The 1919 notice makes no reference to intersecting road lines, and unfortunately a copy sheet 66 of Roll Plan 450 cannot be produced. However it is noted that

a) When the forest status over part of the area was uplifted by Gazette 1930 pages 73 and 74, the description of the land uses Cascade-Barn Bay Road as part of the boundary. The referenced plan X/98/48 cannot be produced. Copy of gazette attached marked J1.

b) When part of the forest was set apart as Permanent State Forest by Gazette 1933 pages 8 and 9, the notice used the following wording was used in describing parts of the boundaries. Copy attached marked J2.

".... To the Barn Bay-Cascade Road; thence generally westerly along the south side of the said road to the Hope River;... "

" and by a right line joining the said point of intersection and the Martyr River Bridge on the Cascade-Jacksons Road; ..." .

This notice also specifies “..... excluding Lake Ellery and all roads”. The only lines of road intersecting the particular area are the subject road line from Cascade to the Hollyford Valley and the Jackson Valley to Cascade portion of the Barn Bay Road.

1.9.2 Otago :-

SO Plans 13889 and 13891 (Otago) are noted as being copies of sheets 6 and 8 of Roll Plan 450 referred to in the 1919 gazette. These plans are based on survey District map series produced by the Department of Lands and Survey. Copies attached marked **K1** to **K2**.

The plans show a road line through the forest land in approximately the same alignment as that on original topographic plan SO 2069.

When the area numbered “35” was set apart as provisional state forest by Gazette 1919 page 1291, the description did not mention the road lines shown intersecting the parcel. Copy attached marked **K3**.

However, when this land was further gazetted as Provisional State Forest in conjunction with other land, by Gazette 1967 page 407, the description excluded all legal roads. Copy attached marked **K4**.

The plan referenced as delineating the forest area is copied as SO 21873, the road lines shown on this plan are the Cascade-Pyke Valley Road and the road from the Pyke River to Big Bay. These appear similar to those particular road lines on SO 2069. Copy attached marked **K5**.

1.10 SO 23070 (Otago) :- Copy attached marked **L**.

This plan was compiled to support declaration of Section 1 (former State Forest) as land for conservation purposes (Gazette 1990 page 142) and subsequently declaring it to be part of Mount Aspiring National Park (Gazette 1990 page 649)

The plan shows Section 1 intersected by road line labelled “Pyke Big Bay Track”.

1.11 Land Allocation Records

These plans are based on NZMS 261 series cadastral maps on which areas of Crown land or State Forest land allocated to the Department of Conservation under the provisions of section 62 of the Conservation Act 1987 are illustrated. A set of schedules describing the allocated parcels forms part of the record.

1.11.1 SO 11209 (Westland) Sheets E38, E39 :- copies attached marked **M1** and **M2**

Plan Sheet E38:- shows the Cascade-Pyke Valley Road intersecting allocation area No 8. The allocation schedule describes area 8 as Pt Res 1692 - Pt Cascade SF 1 - Pt Res 1917.

Plan Sheet E39:- shows the Cascade-Pyke Valley Road intersecting allocation area No 2. The allocation schedule describes area 2 as being Pts Res 1692 – Pt Cascade SF No 1.

By description of the State Forest, in Gazette 1933 pages 8 and 9, the road lines illustrated on these plan sheets as intersecting the Cascade State Forest area cannot be part of the allocated land because were not part of the State Forest.

It is noted that the alignment of the road line shown on these map sheets appear to replicate the existing track illustrated on the corresponding topographic maps.

1.11.2 SO Plans 22252 and 22253 (Otago) represent NZMS 261 map sheets D39 and E39. Copies attached marked **N1** and **N2**

These sheets collectively illustrate the parts of the State forest land described in gazette 1967 page 407 (see appendix K4). They show a road lines labelled Pyke - Big Bay Track and two other unnamed road lines from the Pyke Valley to Big Bay and from the Pyke Valley to Jamestown.

By description of the State Forest in Gazette 1967 page 407 the road lines illustrated on these plan sheets are not part of the allocated land because the were not part of the State Forest.

The alignment of these road lines replicate those illustrated on SO 2069.

1.12 The boundaries of the Sounds (Fiordland) National Park was re-described in the Fifth Schedule of the National Parks Act 1952. This description specifically excluded the Te Anau Milford Highway but did not reference any other Roads.

However, section 33 (1) of that Act provided *"Nothing in this Act shall be deemed to confer on the Board or the Authority any jurisdiction or authority in respect to any public road that is within the boundaries of the Park"*. Copies attached marked **O1**.

The current boundary description in New Zealand Regulation 1978 number 803, includes the statement *"but excluding all public roads"*. Copies attached marked **O2**.

1.13 The Survey System database

The cadastral database maintained by Land Information New Zealand contains data relating to the subject road line as follows :-

- a) In the parcel boundary field; no road lines are shown in Westland Land District but in the Otago Land District;
 - The Hollyford – Pyke Valley road line is shown up to the Land District boundary.
 - The road to Jamestown along the Hollyford Valley is shown.
 - The road line from Jamestown north-east to intersect with the Pyke Valley road line is shown.
 - Parts of the road line from the north end of Big Bay eastward to intersect with the Pyke Valley road is shown.

These road lines shown resemble the lines of roads shown on SO Plan 2069.

- b) In the legal road polygon field; lines of roads are shown in both Land Districts for all of the roads illustrated on SO Plans 5690 (Westland), with the exception of the road from Jamestown north-east to the Pyke Valley
These appear to be aligned on existing physical tracks as illustrated in topographic map data except for one portion of the Barn Bay road.

1.14 File Records

1.14.1 Fiordland National Park FNP90/3 (Southland)

Historical file records relating to the subject "Hollyford Road" [FNP90/3 – now held by Dept of Conservation] show that the Chief Surveyor in Otago was requested to provide an opinion as to the status of this road by the Secretary of the National Park Board in January 1970.

- Letter from the Chief Surveyor Otago (per Chief Draughtsman), to the Fiordland National Park Board Secretary, dated 4 March 1970. This stated :-

"The road alongside the Hollyford River from the Southland Land District Boundary to Lake Alabaster, thence along the Pyke River and through to the Westland Boundary is a legal road, and as such is under the control of the Lake County Council".

- Memo from Chief Surveyor Otago (per Chief Draughtsman), to the Chief Surveyor Invercargill, dated 5 August 1971, entitled 'Road Legality Hollyford Road', he put a qualifier on the first opinion stating :-

"Actually the legality of the whole of this road is open to question and could only be decided by the Court".

This memo went on to confirm that the track as far as Lake Alabaster *"could be said to come under the definition of road under section 79 of the Public Works Act 1876,"*

but expressed doubt about whether the road north of Lake Alabaster and the routes to Jamestown and Big Bay were formed or in use, and suggested that the Chief Surveyor Hokitika may be able to verify this from his records. Copies attached marked **P1** and **P2**

- 1.14.2 A report entitled 'Roothing South-Westland', contained on file FNP90/3, gives a brief outline of development of the carriageway on the Hollyford Valley portion of the subject road. This confirms that construction was undertaken by the Public Works Department with funding from the winter works programme. Extract from the report attached marked **Q**.

- 1.14.3 Westland Lands & Survey Dept File 9/4/4/3/A contains the following records regarding the Cascade to Hollyford Valley Road:-

- Letter from Chief Surveyor O Amor to the Resident Engineer of Ministry of Works and the County Engineer Westland County Council, dated March 1976, advising that road defined on SO Plans 5690 and 9109 was considered to be a "road" in terms of section 110A of the Public Works Act 1928 and therefore legal road. The basis of the interpretation is set in the letter and in a report prepared by RW Lysaught (Divisional Draughtsman). Copies attached marked **R1**.
- Letter from the Minister of Lands to the Secretary of the Local Bodies Association, dated 3 March 1980. This letter stated that the Director General of Lands had advised that the definition of tracks and roads between Jackson Bay and the Hollyford region is somewhat sketchy but it is apparent that they are not legal as they do not fully conform with the requirements of the Public Works Act.
This letter was based on a report prepared by P Lynch (Chief Draughtsman Hokitika). Copies of letter and report attached marked **R2**.
- Letter from the Westland County Council to Chief Surveyor Hokitika, dated 12 December 1980. This notes concern that a South-Westland Forest Management Proposal implied that the Cascade-Pyke Valley Road was a State Forest Track and pointed out that the prior Chief Surveyor's opinion was that it was legal road. Also advised that Council had obtained legal opinion in regard to the legality of the Barn Bay Road. Copy attached marked **R3**.
- Letter from Westland District Council to the Chief Surveyor, dated 13 February 1981, enclosing copies of the legal opinion obtained from Ministry of Works and Development Solicitor BC Rowell. This opinion considered that the Barn Bay road line did meet the criteria set out in section 110(a) of the Public Works Act 1928. Copy attached marked **R4**.
- Memo from the Surveyor General and Chief Surveyor Hokitika, dated 1 April 1981. States that his 1977 opinion was based on the information supplied by the Chief Surveyor, and providing some advice on how the evidence relating to the road status should be re-evaluated. Copy attached marked **R5**.
- Letters from Chief Surveyor Williams to Westland County Engineer and Conservator of Forests, regarding the Barn Bay access road (dated 30 October 1981). This identified that the principal reason behind his status opinion was that there was insufficient approved survey records to support legality of the road. It

seems clear that this comment related to survey definition of the 'formed position' of the road.

The letter also set out a proposal to prepare a plan suitable for the purposes of section 110(d) of the Public Works Act. Copy attached marked R6.

- Summaries of position :- Commissioner of Crown Lands memo dated 20 October 1982 and a Letter from the Conservator of Forests to the Commissioner of Crown Lands dated 23 November 1983. Copy attached marked R7.

1.15 Legislative authorities applicable at the time

1.15.1 Public Works Act 1882 provided the definition the term road :-

Section 79. Throughout this Act, the word "road" means a public highway, whether carriage-way, bridle-path, or footpath, and includes the soil of –

- (1) Crown lands over which a road is laid out and marked on the survey maps;*
- (2) Lands over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such a grant or dedication;*
- (3) Lands taken for roads under the provisions of this Act or any other Act or Ordinance;*
and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and

1.15.2 Public Works Act 1894 added the following two clauses to the definition of "road";

- (4) Lands over which a road has been or is in use by the public which has been formed or improved out of public funds, or out of the funds of any former province, or out of the District Fund of any local authority, for the width formed, used, agreed upon, or fenced, not being more than fifty links on either side of the middle line thereof, and a sufficient plan whereof, approved by the Chief Surveyor of the land district wherein the road is situate, has been or shall be registered by the District Land Registrar or Registrar of Deeds of the district against the properties affected by it;*
- (5) Lands over which any road, notwithstanding any legal or technical informality in the taking, or construction thereof, has been taken, constructed or used under the authority of the government of any former province, or of any local authority, and a sufficient plan whereof is registered in manner provided in the last-preceding subsection.*

1.15.8 The Counties Amendment Act 1972 (section 2) replaced section 191 of the Counties Act 1956;

Section 191 "Road" means the whole of any land which is within a County and which (a) Immediately before the commencement of this section was a road within the meaning of the Public Works Act 1928 or becomes such a road after the commencement of this section, being in either case a road under the control of the Council;

Section 191A (1) provided ; All roads (whether created before or after the commencement of this section) and the soil thereof, and the materials of which they are composed, shall by force of this section shall vest in fee simple in the Corporation.

This changed the ownership of roads within Counties from the Crown to the Local Authority.

1.15.9 Local Government Act 1974

Section 315, as inserted by section 2 of the Local Government Amendment Act 1978 provided; *"Road" means the whole of any land which is within a district, and which – (a) Immediately before the commencement of this Act was a road or street or public highway;*

1.16 Interpretative reference material.

1.16.1 Snushall v Kaikoura County Council is considered to hold relevance in this matter, particularly in the commentary of Chapman J in delivering of the decision at CA 1920 page 806 made the following observations;

..... leaving aside the debatable question as to whether paragraph (a) requires for fulfillment of its conditions that the road shall be physically marked out on the ground, it appears that this is within the terms of paragraph (b), land over which a right of way has been granted or dedicated to the public by a person entitled to make such grant or dedication. I see no reason why the King should not come within the the designation of person ..."

..... Stronger even than this is the circumstance that s. 101 opens with the declaration that "road" means a public highway – that is to say, whatever has become in anyway a public highway – and that the description of certain roads included in the definition is not intended to be restrictive. That the Crown has an inherent power to dedicate roads even by the informal process of allowing the public to use them cannot be doubted:

.... I wish to add one further observation as to dedication by the Crown. Ordinarily when a person dedicates a road the process is not complete until the dedication is accepted by the public. It seems to me, however, that if in the case of dedication of the Crown anything can be wanting to complete it, that want is supplied when the local authority which represents the public elects to treat the road as a public road". Copy attached marked S

1.16.2 Law Relating to Unformed Roads - by former Registrar General of Land, Brian Hayes

This reflects informatively on New Zealand's early settlement era, the significance of the roading network to settlement, legal interpretation of terminology.

Under the heading "Terminology and the law" the paper recounts;

Section 79 of the 1876 Act begins : "The word 'road' means a public highway, whether carriage way, bridle path, and includes the soil of ..."

On the basis of the statutory term "road" has been interpreted to mean:

A public highway, whether used as a carriageway, bridle path, or foot path or intended to be used as such, and it includes the soil thereof

A copy of the section entitled "Key elements of current law" from this paper is attached marked T. The complete paper can be found at www.walkingaccess.org.nz.

1.17 Extract from the Book "The Haast is in South Westland" – author John Cameron

Copies of pages 104 and 105 are attached marked U, they provide evidence of public money having been appropriated for construction of the pack track on the alignment of the Cascade to Hollyford road as well as the other road lines identified on SO 5690

2.0 Commentary

- 2.1 The Mueller report to Parliament evidences that the work was performed for the Government of the day, with the primary purpose of determining practicable routes for access and discovering the structure of the land.

Mueller's work was a Crown funded investment toward future settlement of the area and must be credited as such. The road lines proposed on SO Plans 5690 (Westland) & 2609 (Otago) were required to enable working of the land, timber, minerals and associated settlement of the area.

Pack tracks on or near these alignments have been used historically by the public for access to and through the area, and had closer settlement of South-Westland occurred as anticipated at the time it is most probable that the lines of road identified on SO plan 5690 would have gained survey definition as a result of that closer settlement. Such settlement action is evidenced by Section 2530 on SO 1033 in the Cascade Valley.

The commentary in the Hayes paper regarding early settlement supports such interpretation and the presentation of these plans fits with the specifications for such in the Survey Regulations 1886.

- 2.2 The road line set out on SO 9109 generally follows Mueller's alignment and appears to provide an enhanced definition of this road. This plan was not prepared for the exercise, it must be credited with a purpose in terms of its particular era.

Gerhard Mueller was Chief Surveyor for Westland District. The following extract from Jourdain's history of land legislation and settlement in New Zealand, under the heading 'History of the Lands and Survey Department' put his work in perspective :-

"After the abolition of Provinces the formation, laying out and construction of roads required to go give access to and open up Crown lands for settlement was part and parcel of the Departments activities, but on 1st January, 1902, the newly formed Roads Department, of which CW Hursthouse was Chief Engineer, took over the work, and a few years later it was merged into the Public Works Department." (see pages 202 & 203)

- 2.3 The land affected by the subject road line was unalienated Crown land at the time these plans were produced.

- 2.4 There has been a foot / pack track on a similar alignment, over which the public have had unrestricted use for a long period. The extract from "The Haast is in South Westland" records that public funds were appropriated to establish this pack track.

- 2.5 The Chief Surveyors in both Westland and Otago have given determinations on the status of the road line. Collectively these conclude that the road line did fit with the definition of road set out in section 79 of the Public Works Act 1876.

The contrary decision presented in the Minister of Lands letter (Appendix R2) is recognised, but the basis of consideration on which it was founded is considered to be narrow, examining only the question of adequacy of certain survey plans approved as to survey, and taking no account of the prior Chief Surveyor's opinion or the guidance presented in *Snushall v Kaikoura County Council*. For this reason no weight is attributed to it.

- 2.6 File records show that upgrade of the track within Hollyford Valley, to carriageway standard was Crown funded, and there was an intention to continue development of the road up the Pyke Valley, over time. This work was carried out by the Crown's Works Department with funding appropriated by Government.

The Crown has taken no particular steps to define, declare or proclaim this as 'road' but it clearly is used and accepted as a 'public highway'

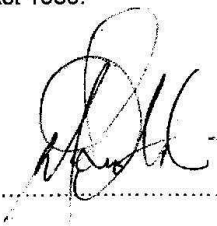
- 2.6 Subsequent designation of surrounding land for particular purposes has excluded the subject road line and other similar intersecting road lines. In doing so recognising them as 'public road' or 'legal road' (refer to paragraphs 1.9 to 1.12 above).
- 2.7 The opinions given by Chief Surveyor Petre (Otago), Chief Surveyor Amor (Hokitika), and the District Solicitor Ministry of Works, all concluded that the subject road line is a "public highway". I consider that those opinions fit well with the summation of what constituted a public highway, given by Brian Hayes, and quoted in 1.15.2 above.
- 2.8 That clauses (e) and (d) added to the definition of "road" in the Public Works Act 1924 were intended to provide for circumstances where some aspect of formalisation of the road status is not clear or is incomplete in some way.
- It is also noted that these clauses clearly offer the specified survey plan as a formalisation process, the wording reading ".....has been or shall be registered"
- 2.9 The definition of "road" in section 315 of the Local Government Act is considered to have broadened the scope of the definition by its wording ".....Immediately before the commencement of this Act was a road or street or public highway."

3.0 Conclusion

1. Based on the referenced information I consider that the road alignment illustrated on SO Plan 9109 (Westland), fell within the broad definition of "road" (Public Highway) set out in section 79 of the Public Works Act 1882, and therefore also falls within the definition of "Road" as set out in section 43(1) of the Government Roding Powers Act 1989 and section 315 of the Local Government Act 1974.
2. That this was a "road" in terms of the Public Works 1928 at the time the Counties Amendment Act 1972 was implemented.
3. That the alignment of the existing walking track and the road set out on SO 9109 are similar but not identical and it is likely that, should a carriageway be developed on this route, it would not follow either of those two precisely. Should a roadway be constructed in future it would be appropriate that the true position of its foot print be defined on a plan prepared for the purposes of section 43(d) of the Government Roding Powers Act 1989.

Report Prepared by

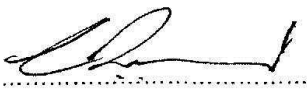
Milton Smith
LINZ accredited supplier



16 May 2011

Report reviewed by

Kit Mouat
Lawyer/LINZ accredited supplier



30 May 2011



**Tavendale
and Partners**

Christchurch
P +64 3 374 9999
F +64 3 374 6888
Tavendale and Partners Limited
Suite 2/21, Leslie Hills Drive
Riccarton, PO Box 442
Christchurch 8140
New Zealand

30 July 2014

Haast Hollyford Highway Limited
c/- Bruce Smith
Control Tower
Hokitika Airport
Hokitika 7810

Dear Bruce

Haast Hollyford Highway

The reasons why the Cascade – Hollyford Road is accepted as Public Highway

The law relating to roads does not differentiate between formed and unformed roads. Many roads in New Zealand when legally constituted were unformed. In the early days of the Colony roads were shown on paper plans without a survey being executed on the ground. Hence the term "paper roads." Roads were shown coloured burnt sienna or a brown colour. The early plan, SO 5690, shows the road coloured burnt sienna or close to that colour. SO 5690 was accepted as a survey record by Chief Surveyor Tercel in 1969.

In March 1976 Chief Surveyor, Owen Amor, formally advised the Westland County Council that the Cascade to Hollyford road was a legal road. Extensive research and enquiries undertaken on behalf of Westland District Council have not identified any documentary records authorising action to uplift the status of this road or any evidence that the Amor opinion has been overturned.

The Council is entitled to rely on the formal notice given by Chief Surveyor Amor that this road is a public highway.

This was a road on 1 January 1973 when section 191A of the Counties Act came into operation (Counties Amendment Act 1972) vesting the fee simple ownership of roads in local authorities.

Other Records That Support this Interpretation

- 1 In March 1970 the Chief Surveyor in Otago advised the Fiordland National Park Board that the road along the Hollyford Valley and the Pyke Valley to the Westland District boundary is a legal road. There is no record of action to alter the status of this road or challenge that determination.
- 2 In February 1981 Council were provided with an opinion produced by Ministry of Works legal officers who determined that the Cascade-Barn Bay Road was a legal road in terms of the statutory definition. This is another of the roads provided for on SO 5690.
- 3 In 1884 Chief Surveyor Mueller reported to the House of Representatives on the lines of practicable connecting roads he had identified within South Westland. This work was clearly undertaken in the context of the following extracts from The Survey Department report made to the Minister of Lands in 1882-83.

KMM-108253-1-29-V1

Under the heading "Settlement Surveys of Rural and Suburban Lands"

"These works, of course, imply the selection and survey of road-lines, so as to secure that each section will have an access and frontage to what either is naturally, or can be made a practicable road. As great dissatisfaction exists in some districts arising from the system pursued in some earlier surveys of running road lines straight without any regard to the features of the country, and in others from no road-lines of any sort being laid off, care is now taken to grade the road-lines in hill country, and that each section wherever situated has a road-frontage".

"Roads are necessarily one of the greatest wants of a new country; and, as it is impossible that much can be done in formation for a long time on the hundreds of miles of main and occupation lines annually laid off in the settlement surveys it behoves the Survey Department to see that the most is made of the natural facilities in each district, by having the best practicable road-lines laid off before the settlers come onto the ground".

Under the heading "Pioneer Road Construction"

"It has been found of the greatest importance that the opening of bridle and dray tracks through the Crown lands should precede their occupation. It would indeed be an advantage if the pioneer roading could in all cases precede even the subdivision or sectional survey. This is being done in several districts..."

- 4 The Gazette notice that removed the Provisional State Forest designation from the land now comprised in the Cascade pastoral lease areas used the Cascade-Barn Bay Road to describe part of the southern boundary of that land.
- 5 The Gazette notice that described the boundary of the surrounding State Forest land:
 - a) Used the Cascade-Barn Bay Road to describe part of the forest boundary .
 - b) Used the bridge of the Jackson River – Martyr Saddle Road as a point on the on the eastern boundary of the forest area.
 - c) The description specified that roads were excluded. The only roads within the area described are the roads shown on SO 5690.
- 6 File records show that between 1977 and 1981 Chief Surveyor Williams and Chief Draughtsman Lynch proffered opinions that the Cascade-Barn Bay road and Jackson Bay-Hollyford roads did not come within the statutory definition of "road" and gained the support of the Surveyor General for their position.

However when advised of the legal opinion produced by the Ministry of Works, which supported the Westland County Council's position on the matter, the Surveyor-General advised Chief Surveyor Williams to review his research. Records show that this resulted in Chief Surveyor Williams taking action to create a plan for the purposes of section 110(d) of the Public Works Act. This action confirms that Williams had accepted the Ministry of Works opinion because such a plan could only be used to define the boundaries of an existing road. This was subsequently supported by the Chief Surveyors own departmental solicitor in 1983, as it relates to the next point 7.

- 7 The only lawful way for the Crown to settle the pastoral lease land in the Cascade Valley was to provide connection with the public road network. The roads on SO 5690 must have been accepted as being public highways.

- 8 Reports to Parliament from the Survey, Lands and Works Departments through the early settlement period clearly establish the intention of the administrators to provide for these road lines and confirm the use of public funding to survey and develop the alignments.
- 9 The former Heaphy Road (Nelson Land District) was defined on SO 11054, which bares great similarity to the Westland plan of the Cascade – Hollyford road, SO 9109. SO 11054 is not approved as to survey nor is the plan noted as being accepted as a survey record however The Heaphy road was treated as a legal road and resumed by the Crown, under the provisions of the Local Government Act, as a procedural step toward enabling the land to be added into surrounding Forest Park.

Commentary on aspects of the law relating to roads

- 10 "Road" provides for the right of passage for any member of the public who wishes to use it. When this road vested in Council, by statute, Council became responsible to see that the right of passage is available to the public. Unformed roads provide a valuable network of access to vast areas of land in New Zealand often to remote areas as in this case. The status and ownership of the road lines shown SO 5690 represent this public right of access aspect and this must be kept separate from debate about any proposed development of the roads.
- 11 The New Zealand Walking Access Commission in its paper of 2011 "Guidelines for the Management of Unformed Legal Roads" made some important comments on the law:
 - At page 9. "The Courts have clarified the legal status of unformed legal roads. The key case is the decision of the Privy Council in *Snushall v Kaikoura County* which reaffirmed decisions previously made by the Supreme Court and the Court of Appeal. The Snushall case established, on authority of the Privy Council, that a road shown on a record plan but not physically 'laid out' on the ground (i.e. a paper road) has the same legal status as a formed legal road."
 - At page 10. "The legal security of an unformed legal road has been protected by the historic and enduring common law right of citizens to pass and repass on a road. This principle has been strongly upheld by the highest courts. Justice Peter Blanchard when delivering the decision of the Court of Appeal in *Man O'War Station Ltd v Auckland City Council* said "The integrity of the roading infrastructure is of such importance to the economic and social welfare of any society that it is to be anticipated that the public right to the use of roads will be given a measure of priority when it comes in conflict with private claims." This judgment makes it clear the court gives priority to rights of public access over private interests when it comes to disputes over roads."
 - At page 24 under the heading "Recommended best practice" it provides for the "Issue" of "Public rights," then "What the law says" being that "The public has rights of free passage on unformed legal roads" and then "Recommended action" is that "Councils should uphold those rights, increase public awareness of them and to legally enforce, if necessary."
 - Appendix B at pages 31 and 32 makes reference to the "pioneering period (1840-1900)." It refers again to *Snushall* and noted "Justice Sim noted that there is a duty on the controlling authority of a legal road to construct and repair. Given the special nature of the then existing unformed roads in New Zealand, the courts, on the basis of earlier decisions, will not enforce that obligation."

12 Section 172(2) Land Act 1948 provides:

“No title to any land that is a road or street, or is held for any public work,..., and no right, privilege, or easement in, upon, or over any such land shall be acquired, or be deemed at any time heretofore to have been acquired, by possession or user adversely to or in derogation of the title of Her Majesty,...”

This applies to roads made before or after the Act came into force. The purpose of this section is to protect forever the roads from any form of adverse possession. This would include adverse possession by State forest or Conservation if that argument should arise.

13 To assist in understanding the sanctity of roads the Land Transfer Act 1952 provides in section 77

“No right to any public road or reserve shall be acquired, or be deemed to have been acquired, by the unauthorised inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorised by law.”

The Crown’s instrument of title to State Forest, Reserve or Conservation lands is by notice in the Gazette, as noted in Supporting Record 5 above. In *Man O’War Blanchard J* at 286 said; “The clear intent of the section is to render ineffective the registration of any instrument in so far as it purports to deal with a road in a manner not authorised by law.” The purpose of referring to this statement is that you cannot deal with a road in a manner not authorised by law. It follows that if LINZ hold no records to support stopping or resumption of the roads shown on SO 5690 then it has no lawful right to remove the boundaries from the cadastre.

Conclusion

The Road is a Public Highway. To progress the matter I have provided a letter of even date, The Way Forward.

Yours faithfully

Tavendale and Partners



Kit Mouat

Consultant

Direct Dial: (03) 963 8019

Email: kit.mouat@tp.co.nz

Mobile: 021 278 0790



**Tavendale
and Partners**

Christchurch
P +64 3 374 9999
F +64 3 374 6888
Tavendale and Partners Limited
Suite 2/21, Leslie Hills Drive
Riccarton, PO Box 442
Christchurch 8140
New Zealand

30 July 2014

Haast Hollyford Highway Limited
c/- Bruce Smith
Control Tower
Hokitika Airport
Hokitika 7810

Dear Bruce

Haast Hollyford Highway

The Way Forward – Front Foot the Process

- a) Westland District Council should resolve that the roads represented on SO Plans 5690 and formerly recorded on published cadastral maps are accepted as being public highways.

Adoption of the report by way of the **attached** draft resolution of Council would be appropriate. Together these would provide a good reference base for any future enquiry as to the status of these roads.

- b) Haast Hollyford Highway Limited (HHHL) should then lodge applications seeking consent to develop the Cascade-Hollyford Highway.

The consent application should provide an undertaking to produce a survey plan defining the boundaries of the road, to LINZ survey standards, once construction is completed.

Other matters

- As part of this review and report the following aspect of the Walking Access Commission paper at page 32 is noted for your information:

“If a Council accepts the vesting of land as a road and that road is unformed, the Council will have a duty to form and maintain it and the Council may be compelled to do so. This has been the law for more than 100 years, providing a caution for councils.”

In this case the vesting in Council was by statute. According to the Commission’s paper HHHL could compel the Council to form and maintain the road.

- HHHL should not be the vehicle to bring the matter to the Court. This is a case where the Council has advice that there is a legal road. The latest comment from the Chief Surveyor was that the road needed better definition. As part of the HHHL development it will be required to better define the line of the road.

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- If the Crown has "doubts" about the status then it may well approach the Court. It may be LINZ or it may be DOC. The position is clear. First, three Chief Surveyors said it was road. Secondly the fourth Chief Surveyor cast some doubt and at the request of the Surveyor-General he was asked to have a good look at the situation and to resolve the matter he had raised and decided that the road required a better survey. Thirdly the solicitor for the Ministry of Works and the solicitor for Lands & Survey are both on record that the road is a legal road.

Someone may challenge the Council's position. If it goes to Court we are ready to defend rather than prosecute an action.

Yours faithfully
Tavendale and Partners



Kit Mouat
Consultant
Direct Dial: (03) 963 8019
Email: kit.mouat@tp.co.nz
Mobile: 021 278 0790

Status of Cascade-Hollyford Road

The road lines shown on Westland SO 5690 have historically been shown on the cadastral survey records as roads.

In March 1976 Chief Surveyor, Owen Amor, formally notified the Westland County Council that the part of Cascade to Hollyford road within the Westland Land District was a legal road. Extensive research and enquiries undertaken on behalf of Westland District Council have not identified any documentary records authorising action to uplift the status of this road or any evidence that the Amor opinion has been overturned.

An opinion produced by Ministry of Works legal officers, dated October 1980, notified Council that the Cascade-Barn Bay Road is a legal road. There is no evidence that this determination has been challenged or overturned.

An opinion produced by the Chief Surveyor in Otago Land District, dated March 1970, notified the Fiordland National Park Board that the portion of the Hollyford-Cascade Road within the Otago Land District is a legal Road. No records have been found to show that this determination has been challenged or overturned, and this portion of the road is shown as such within the current cadastral database.

Representations have been made to Land Information New Zealand [LINZ] over a long period requesting reconsideration of all the available evidence and recognition of the fact that there are no documentary records authorising removal of the roads historically shown as such in the published cadastral records. For their own reasons LINZ has refused to reinstate these road boundaries.

Council is entitled to rely on the formal notice given by Chief Surveyor Amor, particularly when that determination is strongly supported by other similar determinations produced by authorised persons on related road lines.

Decision

Council hereby resolves that the Cascade-Hollyford Road is a legal road in terms of the definition of road specified in section 315 of the Local Government Act 1974.