

4 December 2023

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Dear Roger

## **Milford Sound Concessions**

### Background

1. Milford Sound Tourism Ltd (**MSTL**) seeks to renew two authorisations (lease of Visitor terminal (**1991 Lease**) and licence (**1991 Licence**) to provide public facilities and various structures/services (together the **Authorisations**) granted in December 1991 under the National Parks Act 1980; and a concession lease (**Extension lease**) granted in November 2004 for extensions to the Visitor Terminal and construction of a storage building.
2. The renewals of the Authorisations have been dealt with as applications for concessions under section 49 of the National Parks Act and Part 3B of the Conservation Act 1987.
3. The Extension lease contains a right of renewal for 30 years.
4. A decision support document (**DSD**) has been prepared by the Department. It is in two parts. The first contains a comprehensive range of options for my consideration. I understand that if I grant the applications under one of the options, this will trigger Part 2 of the process which will entail the Department preparing appropriate conditions and then consulting with MSTL and Te Rūnanga o Ngāi Tahu (**Te Rūnanga**) before providing a finalised set of conditions for my approval.

### Decision

5. I have read the DSD (which I attach). It lays out the background and the legal/planning framework for considering applications for concessions. The DSD refers to a range of material (see the description of documents in Appendices 1 – 11 of the DSD) that I have benefitted from reading.
6. I have also seen financial information supporting MSTL's need for a longer term in order to pay back potentially large infrastructure investments. That information has been reviewed by the Department and by an external financial adviser and I have had the benefit of reading it.

7. I note that the Southland Conservation Board was consulted on the applications.
8. The report has been provided in draft to MSTL and I have considered its comments.
9. A draft of the report was also provided to Te Rūnanga and its views were sought and provided as part of the Department's section 4 Conservation Act responsibilities. I have considered their views and reflect on aspects of them in this letter.
10. As a result, and acting under the delegation of the Minister of Conservation, I have decided to grant to MSTL:
  - (a) A renewal of the Extension lease for a period of 30 years commencing on 18 December 2020 and expiring on 17 December 2050.
  - (b) Concessions (the **Concessions**) to replace the Authorisations for terms of 8 years each (the **Terms**) commencing on 18 December 2020 and expiring on 17 December 2028.
11. I have also decided to run an allocation process (the **Process**) under section 17ZG(2)(a) of the Conservation Act before the Terms expire. The Process will involve MSTL and Te Rūnanga and my expectation is that the Department will begin work on developing the Process well in advance of the expiry of the Terms.
12. I emphasise that my decision does not predetermine that Te Rūnanga has or will obtain a preferential right of allocation of the Concessions but I consider the strength of the interests of Ngāi Tahu in Piopiotahi/Milford Sound and the Terms of the Concessions I have granted will provide an opportunity for Te Rūnanga to participate in the Process.
13. My decisions in respect of the Concessions and the Extension lease will require the Department to prepare appropriate conditions and carry out consultation with MSTL and Te Rūnanga on them. Once that consultation has been undertaken and any comments considered, I will be in a position to provide final approval of the documents.

### Reasons for my decisions

14. This is an unfortunately long-running application that raises difficult questions. At its core, it is a single integrated application comprising 3 different components that need to be considered differently. These are set out above.
15. While the Authorisations contain renewal clauses for a further 30 years, any decision to renew them must be considered and treated as applications for concessions under section 49 of the National Parks Act and Part 3B of the Conservation Act (with no requirement for public notification). The renewal clauses in the Authorisations are mandatory relevant considerations for me but they are not determinative given that these are applications for concessions.
16. With respect to the application to renew the Extension lease I accept that, provided MSTL has complied with the terms and conditions of the Extension lease (and I have seen no reason to determine otherwise), it is entitled to a renewal of the Extension lease for 30 years as this matter formed part of the original decision in 2004. I recognise that this leads to the unusual situation where the 1991 Lease

may end up being treated differently by virtue of its being considered under a different legal framework. I also appreciate that the potential future grant of a lease to another party (if that were to eventuate) in circumstances where MSTL holds a lease for part of the same physical building may have its challenges; but I do not see this as being determinative, in the sense of driving an outcome that favours MSTL.

17. With respect to the Authorisations, I appreciate that the extinguished rights of renewal, the inter-relationship between the leases and the licence, the practical difficulties of relevant concessions being potentially held by different parties, and the fact that MSTL says that it requires the income derived from the licence activities to help finance the whole operation, might be challenging. But MSTL has been granted 8-year concessions to replace the Authorisations (effectively with 5 years left to run as they will be backdated to December 2020) and MSTL will be invited to participate in the Process.

### Activity

18. The activities are described in the Decision Support Document. The requests for renewal of the Authorisations have been assessed against the relevant parts of Part 3B.
19. It is an existing operation with known effects. Some questions were raised in the DSD about the level of effects and monitoring over the course of the activities, but there do not appear to be any real questions or concerns about the performance in running the operation to date or its impacts.
20. I accept that the activities applied for are consistent with the statutory planning frameworks. That said, there are objectives and implementations set out in the Fiordland National Park Management Plan that will need consideration in developing conditions for managing the activities.
21. The key issue raised by Te Rūnanga concerns the application of section 4 of the Conservation Act which provides that the “Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. Piopiotahi/Milford Sound is a place of great significance to Ngāi Tahu. Te Rūnanga has outlined the traditional, cultural and historic associations of Te Rūnanga with Piopiotahi/Milford Sound and expressed an interest in the opportunity, through an appropriate allocation process, to carry out the activities that are the subject of these applications/renewal. Te Rūnanga considers that the Department can only comply with the Treaty principle of active protection by declining the Authorisations or granting them on a short-term basis. Te Rūnanga further considers that Treaty principles require Te Rūnanga to be afforded a degree of preference in concession processes and decision-making for concession opportunities associated with Freshwater Basin.
22. Te Rūnanga did not agree with the recommendations in the draft DSD on the basis of the preceding paragraph. Conversely, MSTL supported the recommendations in the draft DSD.

### Consideration

23. The Supreme Court in the *Ngāi Tai ki Tāmaki* case confirmed that section 4 of the Conservation Act is a powerful provision and should not be narrowly construed and that it “requires more than procedural steps. Substantive outcomes for iwi

may be necessary including, in some cases, requiring that concession applications by others be declined.” The Supreme Court emphasised that **what is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with section 4, in a way that best gives effect to the relevant Treaty principles** (at para [54] of the judgment).

24. The Supreme Court commented that “enabling iwi or hapu to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to the Treaty principles”.
25. It is important to note that the Supreme Court also cautioned that:
  - (a) The particular factual context is important in determining how section 4 influences decision making powers. How the Court’s observations are dealt with in a particular decision will depend on which Treaty principles are relevant and what other statutory and non-statutory objectives are affected; and
  - (b) Section 4 does not create a power of veto by an iwi or hapu over the granting of concessions in an area which the iwi or hapu has mana whenua.
26. As a first point, there is no apparent dispute over the strength of Te Rūnanga’s interests and connection to Piopiotahi/Milford Sound. Te Rūnanga has emphasized that Milford Sound/Piopiotahi is a location of immense cultural, historical and economic significance to Te Rūnanga. There is evidence of historic occupation and trails, and there are stories connecting them to the wider Fiordland area. Redress instruments contained in the Ngāi Tahu Deed of Settlement and legislation evidence the strong association and connection of Te Rūnanga with Milford Sound/Piopiotahi and can be used to inform an understanding of Ngāi Tahu’s interests.
27. As a second point, Te Rūnanga has been clear that it has a strong interest in Piopiotahi/Milford Sound concession opportunities, as they carry significant cultural value and would provide economic benefit for Ngāi Tahu Whānui and provide an opportunity to reconnect with ancestral whenua and tell their stories. In seeking a decline or a grant on a short-term basis, Te Rūnanga has said that their interests and aspirations can only be fully explored and understood within the context of a concession allocation process. Te Rūnanga considers that any grant of the Concessions for a further term of 30 years would remove their ability to access these economic opportunities or to consider giving preferential consideration to their rights as Treaty partners and mana whenua (through an alternative allocation process).
28. The current application covers what is described as the primary commercial opportunity at Milford Sound/Piopiotahi. But it is important to note that the DSD says that granting the concession would not remove the opportunity for Te Rūnanga to apply for other opportunities and the Department has also indicated it is committed to exploring any such potential opportunities with Te Rūnanga. The DSD also highlights that there could be opportunities within the terminal building as a sub-lessee (on application to MSTL), and MSTL has said it is very open to taking steps to better reflect Te Rūnanga close connection with Milford Sound/Piopiotahi, both to recognize Te Rūnanga as mana whenua and to enrich the experience for visitors. MSTL also indicated that it is open to the idea of

accommodating Te Rūnanga within the terminal building but noted the potential impact on MSTL's business, and other possible legal implications.

29. The Supreme Court refers to the Department needing to act in a way that "best" gives effect to the principles of the Treaty of Waitangi. While this does not alter the nature of the principles being founded on concepts of reasonableness, it recognises the need to positively demonstrate how the decision-maker has sought to actively protect the iwi/hapu interest in a way that best reflects the Treaty principles.
30. There are a number of options set out in the DSD, broadly ranging from 'decline the application' to 'grant for a shorter period' to 'grant for a further 30 years'. Only one option – 'approve' – is provided for the renewal of the Extension lease and, - for the reasons noted above, I have accepted this recommendation.
31. The tension at play is between the understandable need for investment certainty for MSTL, and a lease term that allows for long-term planning for the infrastructure – and the interests of Te Rūnanga to seek an opportunity to reconnect with Piopiotahi through the exercise of the major concession opportunity in the area. The different positions cannot easily be reconciled, and ultimately it comes down to a consideration of the legal framework and what is the most reasonable outcome in the context of this situation.
32. Te Rūnanga has set out its strong interests in Piopiotahi and has also been clear that it wants the opportunity to take up this commercial opportunity as a means of reconnecting to the place. The Treaty principle of 'active protection' puts an onus on the Crown to consider how it can actively protect Māori interests retained under the Treaty. However, this is not an absolute obligation, but one qualified by reasonableness and context.
33. The DSD states that the recommended option of granting Concessions for 30 years on modern terms and conditions does not reconcile Te Rūnanga's stated interests and views since it does not provide the opportunity and effectively keeps Te Rūnanga out of the activity for a generation. The DSD does recognize that there may still be options better to recognise Te Rūnanga's connections within that frame, but it is important to note that these pathways described in the DSD are far from solid. The same analysis concludes that the 30 year option best reflects MSTL's interests and aspirations and accords with expectations around the applications for Concessions. This option is identified as being the least disruptive from both MSTL's perspective and for users of the terminal building.
34. Given my acceptance that 30 year Concessions do not reconcile Ngāi Tahu's interests and views, it is hard to conclude that this option would best give effect to Treaty principles.
35. Rather, my view is that the decision that strikes the best balance in the circumstances is to grant MSTL short-term Concessions of 8 years (from December 2020) Such Terms give some recognition of the rights of renewal contained in the Authorisations, albeit significantly reduced. But they also accord some preference to Te Rūnanga's views, which I consider reasonable in these very particular circumstances where there is a strong connection to the location, a stated interest in the Concessions opportunities, and activities focused on visitors, amenities, and infrastructure. It also best reflects Treaty principles and will provide a shortened pathway for Te Rūnanga to participate in the Process that I have outlined at paragraph 11.

36. I appreciate that my decision extends the period of uncertainty for MSTL, in particular, and is likely to delay investment in infrastructure. Because of this it will be important that the Department begins work on developing the Process well in advance of the expiry of the Terms so as to minimise the time of uncertainty. It is also a relatively short additional period of uncertainty for MSTL – effectively an additional 5 years from now – as against what is described by Te Rūnanga as being kept out of the opportunity for another generation.
37. I also acknowledge that this decision will create some additional complexity in that it will not address the practical issues of having two different lease periods for different parts of the same building. This will not, however, have a negative impact in the short term and as the two parties determine their next steps, this will be a consideration they will need to work through. A long-term solution may require a collaborative approach between the parties.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Henry Weston', with a horizontal line extending to the right.

Henry Weston  
Deputy Director-General Regional Operations  
Department of Conservation  
*Te Papa Atawhai*