

**BEFORE THE QUEENSTOWN LAKES  
DISTRICT COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991 (the "Act")

**AND**

**IN THE MATTER** of the Queenstown Lakes District Proposed District Plan

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**SYNOPSIS OF SUBMISSIONS FOR:**  
New Zealand Tungsten Mining (#519/#1287)

Hearing Stream 02 - Rural, Rural Residential and Rural Lifestyle, Gibbston  
Character Zone, Indigenous Vegetation and Wilding Exotic Trees - Chapters 21,  
22, 23, 33 and 34

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## MAY IT PLEASE THE PANEL

### 1. Introduction

- 1.1 These legal submissions on behalf of New Zealand Tungsten Mining Limited ("**NZTM** ") address a wide range of matters within the Rural Chapter 21. NZTM presented significant planning evidence and legal analysis in respect of the higher order chapters of the PDP in Hearing Stream 01.<sup>1</sup> Those submissions and evidence are adopted in full and relied upon for the relief sought in this Hearing Stream.
- 1.2 NZTM is calling expert planning evidence from Carey Vivian and evidence from Gary Gray in respect of Hearing Stream 02.
- 1.3 The various consents and permits within the District held by NZTM were considered in Hearing Topic 01. A full description of the NZTM operations and sites is included at paras 4-4.19 of Mr Gray's evidence.
- 1.4 These legal submissions adopt the legal submissions to be presented by Counsel for submitters 502 *et al* to be presented on 26 May 2016 in relation to the following matters;
  - (a) Hearing Process
  - (b) Scope
  - (c) Diversification of the Rural Zone
  - (d) Existing and future environments

And as a result do not intend to duplicate those submissions again today.

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<sup>1</sup> Legal submissions of Ms Baker Galloway dated 22 March 2016, Memorandum of Counsel for NZTM dated 30 March 2016, and evidence in chief of Carey Vivian dated 26 February 2016.

## 2. Hearing Topic 01 – Recap of Legal Issues

2.1 For the benefit of the hearings Commissioners who were not present to hear submissions on behalf of NZTM in Topic 01, a summary of the key aspects of that case presented is as follows;

- (a) *With the changes to provisions sought by NZTM, a balance that gives better effect to the purpose of the Act can be achieved. It will still protect important natural and landscape values as provided for by sections 6 and 7, but it will better allow for proposed mining operations to be assessed on their merits, on a case by case basis.*
- (b) *If the mineral resources that exist in the Queenstown Lakes District rural areas is effectively sterilised by unbalanced objectives and policies, the purpose of the Crown Minerals Act will be frustrated, and the significant benefits foregone.*
- (c) *New Zealand's mining industry, while a small player on the international market, is a significant contributor to the New Zealand economy.*
- (d) *Not only are the benefits significant, any adverse effects are temporary and modern mining methods and rehabilitation techniques continue to advance and improve, are less than under previous mining methods.*
- (e) *Mining differs from other land uses that occur in the rural zone because suitable locations for mining are wholly dictated by the location of the mineral resource. There is no ability to consider alternative sites where the activity could occur and then consider a range of factors to weigh up the most appropriate site. "New sites" cannot be found, if the minerals are not there or are not economically recoverable. The consequence is that if mining is unacceptable in a particular location because of other considerations, then that represents a development opportunity*

*foregone. The opportunity cannot be realised elsewhere.*

- (f) *The PDP does not adequately recognise the benefits of mining (or even the existence of mining) within the District either historically, or in the future. That is an anomaly in light of the significant importance mining has played in the founding and growth of the District.*

### 3. Mining is part of the 'existing environment'

- 3.1 A large part of this district's character, heritage and wealth was founded by mining. The reality of the District's existing environment as described in the Operative Plan and as considered by the reality on the ground is the appropriate starting point.

*"The environment... is not only the current description of its components (as identified in the section 2 RMA decision) but also the past environment as described in the relevant district plan and the reasonably foreseeable environment".<sup>2</sup>*

- 3.2 The existing ODP provisions as discussed by Mr Barr consider the presence of mining through the District wide issue statement, as well as subordinate objectives and policies. The Operative Otago RPS also acknowledges the significance of mining within the region in parts 3, 4, and 5, of the RPS. Those provisions are fully traversed in the evidence of Mr Vivian at pages 5-8 of his evidence.<sup>3</sup>
- 3.3 The landscape evidence of Council even acknowledges the importance of mining to the District historically, and the enjoyment of those historical aspects in the current day.

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<sup>2</sup> *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [20] – [22]

<sup>3</sup> For completeness, the proposed RS is at an early stage although it still must be had regard to by the Hearing Commissioners., significant submissions have been put to the Regional Council to provide for more appropriate provisions acknowledging mining in the Region. The proposed RPS provisions as notified have therefore not been cited within these submissions.

- 3.4 What can be taken from the above is that not all regions and districts face the same resource management issues. Regions such as Otago and Waikato have historically had to manage mining through their planning instruments by nature of the alluvial deposits existing in those regions. By contrast, regions like Southland have different issues to manage such as dairy farming and water resource pressures.
- 3.5 Significant weight should be given to the historical and current importance, and future potential benefits, of mining in the Queenstown Lakes District. The RPS which must be given effect to contains strong objectives to manage the activities of mining.

#### 4. **Diversification of activities in the Rural Zone**

- 4.1 NZTM seeks amended objectives and policies within the Rural Chapter to recognise and provide for mining activities; both to acknowledge the historical connection of mining to the District as well as its importance to the District's wellbeing for present and future generations.
- 4.2 A key theme of the Hearing Stream 01 was that the PDP strategic direction chapters did not provide for a balanced view of all activities which locate in rural zones, instead providing a preference for farming practices.<sup>4</sup>
- 4.3 As submitted in hearing Stream 01 mining is an activity which, by its nature, usually exists in the Rural Zone. It provides significant benefits which are recognised within Part 2 of the Act, and within the Operative Otago Regional Policy Statement ("**RPS**") which this PDP must give effect to.
- 4.4 In addition to an amended purpose statement and relatively minor wording changes to objectives,<sup>5</sup> NZTM has sought new objectives and policies which are identified in

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<sup>4</sup> Section 42A Report, Chapters 3 & 4; para 12.108

<sup>5</sup> Referring wording changes to Objectives 21.2.1

attachment A of Mr Vivian's evidence, at pages 21-3 and 21-4. The rationale for the adoption of those provisions is discussed at pages 14-17 of Mr Vivian's evidence.

- 4.5 Council's planning evidence has adopted in part NZTM's submission but has not adopted the new objectives and policies it proposed. At 21.4 of Mr Barr's s42A report he states the following;

*"NZTM has requested a suite of definitions, modifications to the objective and policies as notified and a new objective and policies that advance mineral exploration. I consider that the objective and policies as notified are balanced in that they acknowledge the economic benefits derived from mining and the locational requirements or constraints of mining, while ensuring that the PDP has appropriate provisions in place to provide for the use of and safeguard of natural and physical resources, particularly in terms of s6 and 7 of the RMA".*

- 4.6 Mr Barr's rationale for not adopting the submissions of NZTM appears to be justified both in terms of an economic analysis of the benefits of mining subject to appropriate environmental bottom lines.

- 4.7 The 'economic benefits' cited by Mr Barr above are however not discussed in Mr Osborne's economic evidence with reference to mining. Mr Osborne states at para 3.9 of his evidence that mining is included as a type of activity which might occur in the rural areas of the District, and that;

*"The damage of concern is more likely to occur cumulatively through establishment over time of multiple activities which impact on or change the environment and which reach a level where the collective impact is significant and reaches a tipping point".<sup>6</sup>*

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<sup>6</sup> Para 3.9 evidence of Philip Osborne dated 06 April 2016

- 4.8 Mr Osborne's evidence then goes on to consider at length the effects of the tourism industry on ONFLs in the District and the importance of safeguarding the natural landscape as an economic resource.
- 4.9 The above is not an analysis of how the objectives and policies adequately recognise the benefits of mining. Nor does Mr Osborne acknowledge or explain how he factored in the fact that the effects of mining on the landscape are short term and temporary, and furthermore he does not acknowledge that the footprint of a mining operation can be comparatively very small, yet will yield a very high value in terms of output.
- 4.10 With respect to Mr Barr's statement about safeguarding resources in Part 2 matters, it is assumed this is based upon landscape evidence. However, the evidence of Dr Read does not consider mining effects on landscape character other than in the context of the Upper Clutha River where she states;

*"Settlement of the upper Clutha basin by Europeans began in the 1860s driven by gold mining and pastoralism. Mining sites on the edges of the river are still identifiable by the scouring caused by sluicing and by the location of stone piles; cottage remnants and groves of Lombardy poplars which have often resulted from the construction of "temporary" yards for stock or horses.*

*While sometimes considered less aesthetically pleasing than the Wakatipu area I simply consider that it is less classically picturesque and that its aesthetic appeal is its more raw, natural and untamed character. That this landscape is highly valued can be measured by the number of submissions and appeals brought by members of the Wanaka community against*

*development proposals which they perceive to present a threat to the landscape's quality and integrity".<sup>7</sup>*

- 4.11 Although it seems odd that Dr Read's analysis of the character of an area is based upon the litigation of that area as opposed to its landscape characteristics, her point that the 'temporary' and historical existence of mining has not detracted from the natural amenity of the landscapes is important and is equally valid in the Glenorchy sites where NZTM operates.

The Council's case for not adopting the proposed provisions of NZTM therefore does not appear to be supported by its evidence. There is no economic basis for rejecting the relief sought by NZTM, and no explicit evidence in terms of potential adverse effects either. *NZTM's Case – mining and sustainable management*

- 4.12 In considering the narrative and open-texture nature of section 5<sup>8</sup> the Commissioners will of course keep in mind the overall balancing approach which is needed; in *NZ Rail* the high Court rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.<sup>9</sup> Rather, Grieg J considered that the preservation of natural character was subordinate to s5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "*not an end or an objective on its own*" but an "*accessory to the principal purpose*" of sustainable management.<sup>10</sup>

- 4.13 A clear part of the section 5 purpose is the relevance of economic and social benefits of activities where there is adequate protection for the natural environment. The effects of potential employment, business, goods and

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<sup>7</sup> Paras 3.1.8-3.1.9 evidence of Marion Read dated 06 April 2016

<sup>8</sup> As discussed in *NZ Rail v Ltd v Marlborough District Council* [1994] NZRMA (HC) with respect to the overall 'broad judgment' approach and unchanged by the Supreme Court in *King Salmon* with respect to a plan review.

<sup>9</sup> *NZ Rail v Ltd v Marlborough District Council* at [86]

<sup>10</sup> *Ibid* at [85]



services to be provided from appropriate mining activities to the District are clearly relevant...

consideration at

- 4.14 Minerals are expressly excluded in section 5(2)(a) of the Act from the requirement to sustain;

*"... the potential of natural and physical resources...  
to meet the reasonably foreseeable needs of the future generations."*

This exclusion recognises the non- renewable nature of many mineral resources.

- 4.15 The Court in *Gebbie v Banks Peninsula District Council*<sup>11</sup> the Court helpfully summarised the point as follows;

*"Thus while natural and physical resources including minerals have to be managed sustainably there is one express exclusion. There is no duty to manage the use of minerals" so as to sustain their potential to meet the foreseeable needs of future generations. In other words any attempt under the RMA to control the rate at which New Zealand runs out of minerals is illegal. I consider that the exclusion of use of minerals from section 5(2)(a) makes it clear that the use of minerals and especially the activities of extracting them (i.e. mining and quarrying) are to be managed sustainably in every other way".<sup>12</sup>*

- 4.16 The Environment Court in *Solid Energy New Zealand Ltd v West Coast Regional Council and Buller District Council* considered the adverse effects of an open cast coal mine were balanced against the economic benefits that the proposed operation would ring to the local, regional , and

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<sup>11</sup> *Gebbie v Banks Peninsula District Council* (Environment Court C117/99, 24 June 1991)

<sup>12</sup> *Ibid* at [16]

national economic, and the matters of national importance set out in s 6 of the Act.<sup>13</sup>

(a) *Amenity values*

4.17 With respect to section 7(c) the definition of amenity values means *'those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes'*. As noted in the landscape report of Dr Read areas where mining has been undertaken historically have changed the landscape in some instances, contributing to people's current perceptions and enjoyment of that landscape.

4.18 Amenity values are broad and are not just based upon naturalness or pristine aspects. The ability for mitigation of mining sites through off-setting can provide for enhanced access and enjoyment for the public in the future to ONFLs which would not otherwise be able to be achieved without the economic benefits derived from mining.

5. **The concept of Offsetting under the RMA**

5.1 The amendments sought to the offsetting provisions of Chapter 21 are included in the evidence of Mr Vivian at page 17 to provide under objective 21.2.5 as follows;

*"Consider the use of off-setting or environmental compensation for mining activity by considering the extent to which adverse effects can be directly offset or otherwise compensated, and consequently reducing the significance of the adverse effects".*

5.2 In considering subsections (a) (b) and (c) of section 5, a significant part of this decision is to consider the state of the air, and water resources while mining is happening and once mining ceases, and the impact of that on the community. Modern mining methods and adequate

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<sup>13</sup> *Solid Energy New Zealand Ltd v West Coast Regional Council and Buller District Council (Environment Court, C 74/2005, 25 May 2005).*

offsetting provisions in the Plan can ensure that those natural resources are safeguarded for future generations, as described in Mr Gray's evidence in section 6;

*"Modern mines rehabilitate and restore the ecosystem after mining to a state that is as good or better than prior to mining".<sup>14</sup>*

- 5.3 In this context the term "*environmental compensation*" is not used in the RMA however the concept usually arises where an applicant to a resource consent does something more than volunteer to avoid, mitigate or (occasionally) remedy the more direct effects of a proposal. In *JF Investments Limited v Queenstown Lakes District Council* the Court gave a definition as:

*"any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought."<sup>15</sup>*

- 5.4 The Court in *J F Investments* stated *"that off-site work or service or a covenant, if offered as environmental compensation or a biodiversity offset, will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:<sup>16</sup>*

- (a) *It should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;*
- (b) *It should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;*

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<sup>14</sup> Evidence in Chief, Gary Gray, dated 21 April 2016 at para 6.3

<sup>15</sup> *J F Investments Limited v Queenstown Lakes District Council*, (C048/06, 27 April 2006, Jackson J) at para [8]

<sup>16</sup> *Ibid* at [42].

- (c) *It must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;*
- (d) *There should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;*
- (e) *It should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document."*

5.5 In the case of *Transwaste Canterbury Ltd v Canterbury Regional Council* the Court allowed preparation for a new landfill site to remove areas of remnant lowland forest, in return for increased protection and maintenance of other larger enhanced ecologically and more desirable remnants, as part of 400 hectares of land being turned into a conservation area. At paragraph 113 the Court stated:

*"Overall the application has been presented to the Court as a package. Discernible benefits to the wider environment of Kate Valley and to the region as a whole are proposed as part of this total package. Thus in any consideration under part II and in the integration necessary under section 5, these benefits are advanced as a critical feature".<sup>17</sup>*

5.6 The High Court in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council and West Coast Regional Council and others*<sup>18</sup> considered the relationship between offsetting and mitigation in the context of a mining proposal.

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<sup>17</sup> *Transwaste Canterbury Ltd v Canterbury Regional Council* (C29/2004, Smith J) at para [113]

<sup>18</sup> *Royal Forest and Bird Protection Society of New Zealand v Buller District Council and West Coast Regional Council and others* [2013] NZHC 1346

5.7 The High Court confirmed that not all effects need to be addressed by way of mitigation, offset, or compensation. It stated:

*"It is clear that Parliament did not intend the RMA to be a zero sum game, in the sense that all adverse effects which were unavoidable had to be mitigated or compensated."*<sup>19</sup>

5.8 The High Court decision effectively means that offsets address the residual effects of a proposal, and are to be treated as a positive environmental effect offered by an applicant to be taken into account as offsets to adverse effects of the proposal. Offsets can be considered when assessing an application for resource consent under the RMA pursuant to:

- (a) Section 104(1)(a) which allows the taking into account of positive effects on the environment proffered by the applicant in consideration for allowing the activity; and
- (b) Section 104(1)(c) which allows consideration of any other matter the consent authority thinks is relevant and necessary to determine the application; and Section 5(2) which provides for the sustainable management purpose of the RMA<sup>20</sup>.

5.9 The High Court observed that the parties to the proceeding used the term "compensation" as a synonym for offset, and that so does the Environment Court in a number of decisions. The Court expressed a view that compensation should be distinguished from offsets, but couldn't make a finding on the basis that it hadn't been argued before it.<sup>21</sup>

5.10 What can be taken from the above lines of cases is that offsetting and environmental compensation have been approved of (and used synonymously by the Environment

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<sup>19</sup> Ibid at [52].

<sup>20</sup> Ibid at [72].

<sup>21</sup> Ibid at [124].

Court) as a package of measures that together justify granting consent for mining so that the benefits can be obtained. And although most commonly the principles are applied as a concept of biodiversity gains, its application is equally relevant to other environmental aspects such as landscape (e.g. wilding pine offsets), heritage values (e.g. protection, restoration and interpretation) and recreation (e.g. new tracks or new recreational amenities).

5.11 The desiderata produced in *J F Investments* above have been reapplied in many subsequent decisions of the Courts. Those factors are not limited to biodiversity but instead focus on the nature, ad scale of adverse effects as compared to the potential positive gains to be made through compensation.

5.12 Applying the above case law to the submission of NZTM to provide for an offsetting policy relevant to mining (under Objective 21.2.5) will appropriately ensure future decision makers properly consider offsetting proposals for addressing adverse effects which are broader than biodiversity. Landscape mitigation and the provision of public access are examples of how the policy could be applied in the future. The addition of this policy will recognise that offsetting can occur from a range of rural based activities; it is unnecessarily limiting for the plan to only address the concept within the in Indigenous Vegetation chapter.

## 6. **'Inappropriate' in the context of what is sought to be protected**

6.1 In the Course of Hearing Stream 01, the process for identifying and providing for ONFLs within section 6 was discussed at length.

6.2 The High Court in the *Man o War* litigation, reasoned that characteristics of a landscape should first be identified and then provisions

should be set to *recognise and provide* for those characteristics.

*"It is clear from the fact that "the protection of outstanding natural features and landscapes" is made, by s 6(b), a "matter of national importance" that those outstanding natural landscapes and outstanding natural features must first be identified. The lower level documents in the hierarchy (regional and district policy statements) must then be formulated to protect them. Thus, the identification of ONLs drives the policies. It is not the case that policies drive the identification of ONLs, as MWS submits".<sup>1</sup> "As identified by the Council, the RMA clearly delineates the task of identifying ONLs and the task of protecting them. These tasks are conducted at different stages and by different bodies. As a result it cannot be said that the RMA expects the identification of ONLs to depend on the protections those areas will receive. Rather, Councils are expected to identify ONLs with respect to objective criteria of outstandingness and these landscapes will receive the protection directed by the Minister in the applicable policy statement".<sup>22</sup>*

- 6.3 If the Supreme Court's reasoning in *King Salmon* in the determination of what is 'inappropriate' is considered within the context of what is sought to be protected, then clearly those characteristics, features, and values must be more explicitly identified in the Plan if such identification is to be of meaningful assistance to decision makers.

*"We consider that "inappropriate" should be interpreted in s 6(a), (b), and (f) against the backdrop of what is sought to be protected or preserved, that is, in our view, the natural meaning."<sup>23</sup>*

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<sup>22</sup> *Man O War Station Ltd v Auckland Regional Council* [2015] NZHC 767, at [59]- [60]

<sup>23</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] NZSC 38, at [105]

- 6.4 These considerations are particularly important where in this District over 96% of the land has been classified as protected in accordance with section 6 of the RMA.
- 6.5 The identified features of the ONF, Mt Alfred, for example are considered at para 5.3.1 of Dr Read's Hearing Stream 02 evidence and includes the existence of scheelite mining and relics of the mine.
- 6.6 The amended provisions sought by NZTM will provide for those recognised aspects as the starting point for consideration of future activities. Blanket protection, without allowing future decision makers the flexibility to consider those on the ground characteristics by contrast would not be appropriate or consistent with higher court authority on the RMA purpose.

## 7. Evidence

### 7.1 *Carey Vivian*

- (a) The evidence of Mr Vivian considers the rules, assessment matters, policies and objectives proposed by NZTM within Rural Chapter 21. This evidence builds upon the strategic direction chapter evidence given in Hearing Stream 01 and is intended to give effect to those provisions as amended. Mr Vivian provides variations in some instances to the wording of NZTM's initial submission. Those variations are considered on the whole to give effect to the purpose and intent of the NZTM submission and give effect to the legal reasoning detailed in these submissions. In particular, Mr Vivian has made a thorough assessment of the relevant parts of the Operative RPS, which is a legal requirement for the PDP to give effect to.

### 7.2 *Gary Gray*

- (a) The evidence of Mr Gray provides an industry specialists' point of view on the operations and effects of mining undertaken within the District. Mr Gray's



evidence builds on the presentation of Bernie Napp of Strattera presented to the Panel in Hearing Stream 01, and the Commissioners are encouraged to listen to that presentation recording. Mr Gray is a director of NZTM and has extensive experience on the process of obtaining and utilising exploration and prospecting permits. This evidence covers the historical aspects of mining in the District as compared to modern day mining methods, and considers the advances in technology over the decades providing for today, what can in some instances, be considered as a relatively low long term impact on the environment.

## **8. Conclusion**

- 8.1 Mining is an important activity to be recognised within the Queenstown Lakes District. It played a significant role in the founding of the district, the shaping of its character, heritage and some of its landscapes and of course provided significant economic benefits. Mining can continue to play this very positive role. It is unique as it is consumptive, but also has the ability to better the environment overall through offsetting and mitigation.
- 8.2 It is important that the PDP provide this recognition by directly acknowledging those important considerations and benefits, and by ensuring the provisions are broad enough for future decision makers to consider applications for appropriate mining activities without unnecessary constraint.
- 8.3 In the case of NZTM's operations, there are clear examples of appropriate and important development which cannot be realised by the District if the objectives and policies of the Plan require an unnecessarily high level of protection or avoidance of adverse effects.

Dated this 23<sup>rd</sup> day of May 2016

A handwritten signature in black ink, appearing to read "Maree Baker-Galloway". The signature is fluid and cursive, with the first name "Maree" being the most prominent.

Maree Baker-Galloway

Counsel for NZTM