COPY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 429/93

BETWEEN BULLER ELECTRICITY LIMITED

Plaintiff

000743

A N D THE ATTORNEY-GENERAL sued in respect of the Minister of Conservation

Defendant

Hearing: 20 June 1995

Counsel: P.J. Radich with J.L. Johnston for plaintiff
M.T. Parker with C.C.M. Owen for defendant

Judgment: 20 June 1995

JUDGMENT OF DOOGUE J

INTRODUCTION

The plaintiff in this proceeding alleges that the Minister of Conservation made a flawed decision that certain land in the Buller region is not available for a proposed Ngakawau hydro-electric scheme.

The parties have agreed that certain questions of law should be answered prior to the trial of the substantive proceeding. Those questions arise out of the decision of the Minister of 5 August 1993. That decision included the following statements:

> "Before disposing of the land I must be satisfied that it is no longer required for conservation purposes."
>
> "Furthermore I am not required by any legislation to facilitate hydro-electric development."

"Social and economic factors are not relevant considerations for me under the Conservation Act."

"Notwithstanding the above comments, should I decide that the land is no longer needed for conservation purposes and I decide to dispose of it I am then required to hand the land over to the Commissioner of Crown Lands for disposal.

Public Works Act

"All land held under the Conservation Act and the Acts in its First Schedule are public works under the Public Works Act. Before disposing of the land the Commissioner of Crown Lands must comply with section 40 of the Public Works Act which requires him to consider whether the land is required for another public work or, if it is not, to offer the land back to the original owners. It would only be if the original owners did not wish to acquire the land could it be offered for public disposal."

The questions posed for the Court are as follows:

"(1) Before disposing of land held as a conservation or stewardship area under the Conservation Act 1987 ('the Act') must the Minister of Conservation ('the Minister') be satisfied that it is no longer required for conservation purposes?

(2) Under the Act are social and economic factors relevant considerations when deciding whether or not to dispose of land held as a conservation or stewardship area?

(3) In deciding whether or not to dispose of the land sought by the plaintiff for the proposed Ngakawau hydro-electric scheme, was the Minister required to have regard to, and/or would the plaintiff have legitimately expected the Minister to have regard to, the West Coast Accord?

(4) Does section 40 of the Public Works Act 1981 apply to the disposal of the land sought by the plaintiff?"

The first, second and fourth of those questions give rise to matters of statutory interpretation of general importance. The third question may have a wider application but it would be limited to parties who may claim some

interest pursuant to or in reliance on the West Coast Accord.

As the questions are basically legal questions and it can only be on that basis that they can be disposed of prior to trial, I do not intend to traverse the facts except insofar as they are essential to an understanding of the questions. I will deal with the first two questions together as the submissions in respect of them were dealt with together. For a consideration of these questions, and indeed the questions generally, it is necessary to give consideration to the relevant provisions of the Act. To enable the understanding of those provisions with reference to the present case, it is necessary to preface them with the statement that the land in question in the present case is deemed to be held for conservation purposes under the provisions of s. 62 of the Act and, as a consequence, by virtue of the definition of "stewardship area", is deemed to be such an area.

The parties are agreed that the issue of whether the Minister could dispose of the land requires a consideration of s. 26 of the Act in the context of the Act generally.

The relevant provisions of the Act are as follows.

RELEVANT PROVISIONS OF THE ACT

Long title:

"An Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation"

Section 2(1):

"In this Act, unless the context otherwise requires, -

....

'Conservation' means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations:

....

'Conservation area' means any land or foreshore that is -

(a) Land or foreshore for the time being held under this Act for conservation purposes; or

(b) Land in respect of which an interest is held under this Act for conservation purposes:

....

'Historic resource' means a historic place within the meaning of the Historic Places Act 1980; and includes any interest in a historic resource:

....

'Maori land' has the same meaning as in Te Ture Whenua Maori Act 1993:

....

'Natural resources' means -

(a) Plants and animals of all kinds; and
(b) The air, water, and soil in or on which any plant or animal lives or may live; and
(c) Landscape and landform; and
(d) Geological features; and
(e) Systems of interacting living organisms, and their environment; -

and includes any interest in a natural resource:

....

'Preservation', in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values:

....

'Protection', in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes -

(a) Its restoration to some former state; and

(b) Its augmentation, enhancement, or expansion:

....

'Stewardship area' means a conservation area that is not -

(a) A marginal strip; or
(b) A watercourse area; or
(c) Land held under this Act for one or more of the purposes described in section 18(1) of this Act; or
(d) Land in respect of which an interest is held under this Act for one or more of the purposes described in section 18(1) of this Act:"

Section 3:

"This Act binds the Crown."

Section 4:

"This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

Section 5:

"There is hereby established a department of State to be known as the Department of Conservation, which shall be under the control of the Minister."

Section 6:

"The functions of the Department are to administer this Act and the enactments specified in the First Schedule to this Act, and, subject to this Act and those enactments and to the directions (if any) of the Minister, -

(a) To manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, ...:

(ab) ...

(b) To advocate the conservation of natural and historic resources generally:

(c) To promote the benefits to present and future generations of -

(i) The conservation of natural and historic resources generally and the natural and historic resources of New Zealand in particular; ...

....

....

(e) To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism:

(f) To advise the Minister on matters relating to any of those functions or to conservation generally:

...."

Part IIB makes certain provisions for the Guardians of certain of the Southern Lakes, acknowledging that the Guardians can make recommendations in respect of the Manapouri-Te Anau hydro-electric scheme and matters other than purely conservation matters.

Section 7, in Part III of the Act, provides:

"(1) The Minister, and the Minister responsible for an agency or department of State that has control of any land or foreshore, may jointly, by notice in the *Gazette* describing it, declare that the land or foreshore is held for conservation purposes; and, subject to this Act, it shall thereafter be so held.

(2) The Minister may, by agreement, acquire any interest in land for conservation purposes; and, subject to this Act, it shall thereafter be held for those purposes.

(3) Nothing in subsections (1) and (2) of this section applies in respect of land that is Crown forest land within the meaning of section 2 of the Crown Forest Assets Act 1989.

(4) For the purposes of subsection (1) of this section, the Minister of Forestry shall be deemed to be the Minister responsible for a department of State that has control of State forest land that is not Crown forest land within the meaning of section 2 of the Crown Forest Assets Act 1989."

It should be noted that in this part of the Act section 14 makes provision for conditions on the issuing of leases

and licences in respect of conservation areas and provides also for the price in respect of any disposition of an interest in a stewardship area to be the market price. There are limitations on the issue of leases and licences unless there is a conservation management strategy or plan for the particular area and the lease or licence is in conformity with and authorised by the particular strategy or plan.

Section 15 enables the creation of easements over lands held for conservation purposes.

Section 16(1):

"Notwithstanding anything in the State-Owned Enterprises Act 1986 but subject to the Public Works Act 1981, no conservation area or interest in a conservation area shall be disposed of except in accordance with this Act."

Part IV of the Act enables the Minister to provide for additional specific protection or preservation in respect of certain areas of conservation land by giving them a classification provided for in the sections within that part of the Act.

Section 25:

"Every stewardship area shall so be managed that its natural and historic resources are protected."

Section 26:

"(1) Subject to subsections (2) and (3) of this section, the Minister may dispose of any stewardship area that is not foreshore or any interest in any stewardship area that is not foreshore.

(2) The Minister shall not dispose of any land or any interest in any land adjacent to -

(a) Any conservation area that is not a stewardship area; or
(b) Land administered by the Department under some enactment other than this Act, -

unless satisfied that its retention and continued management as a stewardship area would not materially enhance the conservation or recreational values of the adjacent conservation area or land or, in the case of any marginal strip, of the adjacent water, or public access to it.

(3) The Minister shall not dispose of any land or any interest in land without first giving notice of intention to do so; and section 49 of this Act shall apply accordingly.

(4) Upon being disposed of under this section, the land or interest in land shall cease to be held for conservation purposes.

(5) As soon as is practicable after disposing of any land or interest in land, the Minister shall publish in the *Gazette* a notice -

(a) Describing the area concerned; and
(b) Specifying the interest and the revenue (or, where the interest was disposed of by way of exchange or part exchange, the consideration) received for it.

(6) Any disposal under this section may be effected by transfer under the Land Transfer Act 1952.

(7) A District Land Registrar shall accept any such transfer as conclusive evidence that the land or interest concerned is no longer required for conservation purposes."

Section 62, in Part VIII of the Act, provides:

"(1) Any land or foreshore that, -

(a) Immediately before the commencement of this Act was State forest land or Crown land; and

(b) Was not then a forest sanctuary, forest park, ecological area, or wilderness area; and

(c) Is land or foreshore that the Minister, and the Minister responsible for a department or agency of State that then had control of it, have agreed should be held for conservation purposes; and

(d) Is identified for the purposes of this section on plans lodged in the office of the Chief surveyor for the land district in which the land or foreshore is situated (being plans certified as correct for the purposes of this section by that Chief Surveyor), -

shall, until it is declared under section 7(1) of this Act to be held for conservation purposes, be deemed to be held under this Act for conservation purposes; but neither it nor any interest in it shall be disposed of.

(2) Nothing in subsection (1) of this section restricts or prevents the granting under this Act of a lease, licence, or easement over any land."

There are other provisions to which reference has been made in argument by counsel. I have not overlooked such sections, such as those, for instance, dealing with marginal strips, but the provisions already set out are those which contain the provisions of the Act dealing with areas deemed to be held for conservation purposes and the disposal of land within such areas and the sections or provisions which would have to determine the Minister's approach to the exercise of his powers.

It will be noted from the provisions of s. 62 that, in the event of the Minister seeking to deal with the land other than for conservation purposes, it is necessary for it to be declared under s. 7(1) of the Act to be held for conservation purposes. If the land is then brought within s. 7(1) of the Act, it can be disposed of in terms of ss 16(1) and 26 of the Act. Sections 26(2) and (3) provide limitations on disposal which do not apply to the facts of the present case. Section 26(4) provides that after land is disposed of under the section it has ceased to be held for conservation purposes. Section 26(7) notes that if there

has been a transfer of any such land the District Land Registrar is to accept it as conclusive evidence that the land or interest concerned is no longer required for conservation purposes.

It is further to be noted that under s. 25 of the Act every stewardship area is to be managed so that its natural and historic resources are protected. The long title to the Act emphasises that conservation is the principal objective of the Act. The definitions of "conservation", "conservation area", "preservation" and "protection" all underline that conservation is the objective of the statute, as do the functions of the Department itself under s. 6 of the Act.

QUESTIONS 1 AND 2

"(1) Before disposing of land held as a conservation or stewardship area under the Conservation Act 1987 ('the Act') must the Minister of Conservation ('the Minister') be satisfied that it is no longer required for conservation purposes?

(2) Under the Act are social and economic factors relevant considerations when deciding whether or not to dispose of land held as a conservation or stewardship area?"

The argument between the parties is whether or not the Minister is entitled to consider purposes other than conservation purposes before reaching a decision to bring land which is held under s. 62 within s. 7 to enable its disposal under s. 26.

For the plaintiff it is submitted that it is open to the Minister, when there are no specific criteria dealing with the disposal of land under s. 26, to consider factors

other than conservation purposes and, in particular, social and economic factors. Whilst it is accepted for the plaintiff that the proper approach is to ascertain the objects of the Act from the whole of its provisions, it is submitted that, when permitted purposes are left unspecified or are not exhaustively specified, as is said to be the case here, the Court can look at the wider considerations in determining whether the Minister's powers are limited in the way in which the plaintiff says the defendant seeks to limit them.

The defendant submits that the true intent and meaning of the empowering Act necessarily limit the Minister's powers to a consideration of whether or not land is required for conservation purposes before a decision is made to dispose of part of it under s. 26. For the defendant it is submitted that to take any other consideration into account would be an irrelevant and improper purpose and that economic or social factors in particular are not relevant for the purpose of the Act.

The plaintiff has called in aid decisions of this Court in other cases: Spectrum Resources Ltd v Minister of Conservation [1989] 3 NZLR 351 and Birds Galore Ltd v Attorney-General of New Zealand & Anor (unreported, High Court, Auckland, CP 1161/86, 23 June 1988, Barker J). I do not find either of those cases of any assistance whatever. The first case involved the Mining Act 1971, where the Minister had failed to give primacy to that Act as the Minister was bound to do but had purported to act under the Act. The second case involved the Wildlife Act 1953, where

the second defendant had failed to give primacy to that Act as was required in purported reliance upon the Act.

In the present case there is no other Act of relevance. The issue is solely one of the proper approach of the Minister to exercising his powers of disposal under s. 26. The issue is whether he is entitled, in the exercise of his discretion, to come to a conclusion that land should be disposed of for reasons dealing with purposes other than conservation purposes. It is accepted that the land in the present case was properly conservation land. It is not suggested that it did not have conservation values and could have been disposed of by the Minister regardless of the conservation standing of the land.

When the Act is looked at as a whole, there is no basis upon which the Minister could sell the land or otherwise dispose of it unless he was satisfied that it was no longer required for conservation purposes. The Minister could not properly give consideration to social and economic or other factors. I reach those conclusions for the following reasons.

First, the Minister is obliged under s. 25 of the Act to manage a stewardship area so that its natural and historic resources are protected. If he sought to dispose of land which had natural or historic resources worthy of protection, he would be in breach of the mandatory provision which applies to stewardship areas of which, it is acknowledged, this land would have formed part.

Equally, when the Act is looked at as a whole in respect of its long title, the definitions to which

reference has been given above, the provisions of s. 7(1) of the Act and the lesser provisions in s. 6 of the Act combined with the other provisions of the Act to which reference has been made, it is apparent that the objective of the Act is to ensure that land which has been reserved for conservation purposes should be so reserved unless there is a good and proper basis for uplifting the protection which has been placed upon the land. There are no doubt cases where that would arise where land, for example, has been acquired as part of a stewardship area which in fact has no natural or historic resources for protection: for example, where to obtain an area desired for protection a larger area has had to be obtained. Other examples can readily be thought of, as, for instance, where land long held as a conservation area may have within it areas that do not require or deserve protection in terms of the Act.

Further, the very provisions of s. 26(7) providing that a transfer, at least for the purposes of the District Land Registrar, shall be conclusive evidence that the land or interest concerned is no longer required for conservation purposes underline the fact that the transfer is for the purpose of indicating that land is no longer required for conservation purposes. If land is genuinely required for conservation purposes, then, notwithstanding that it could have other uses or benefits for the community at large, how could the Minister act in a way giving rise to such a conclusion?

If the Minister was required to take into account in reaching a determination social or economic or other aspects

which may be relevant to the land, he would necessarily be considering purposes other than conservation purposes where in the context of the Act which he is obliged to uphold it is plainly the conservation purposes which are the only purposes which he is required to uphold and protect. It is not for him in terms of this statute to consider other interests. It may well be that in certain cases other interests would be seen as having greater priority than the conservation interests reflected in the classification of the land under the Act. In that event, as in analogous cases which have arisen in the past, no doubt consideration would be given to appropriate legislation to take the land outside the Act.

It is unnecessary, given the decision reached, for me to further consider the first two questions or the submissions made to me on behalf of the parties. The appropriate answers to the first two questions are:

> "Yes, the Minister must be satisfied that the land is no longer required for conservation purposes before he could dispose of it under either ss 16 or 26 of the Act, assuming the land is classified as a conservation or stewardship area; and
>
> 'No' in respect of question 2, in that social and economic factors are irrelevant considerations when deciding whether or not to dispose of land held as a conservation or stewardship area."

QUESTION 3

> "In deciding whether or not to dispose of the land sought by the plaintiff for the proposed Ngakawau hydro-electric scheme, was the Minister required to have regard to, and/or would the plaintiff have legitimately expected the Minister to have regard to, the West Coast Accord?"

Question 3 gives rise to other considerations. It is necessary to note briefly that the West Coast Accord is said to be a combination of certain documents which are not totally agreed by the parties. It is accepted, however, that the principal document is an agreement dated 6 November 1986 between a variety of parties and the Crown, acting by and through the Minister for the Environment, which in general terms gave effect to what is known as the Blakely Report, the Final Report of the West Coast Forests Working Party intituled "West Coast Forests Integrating Conservation & Development". Within that report there is a provision in paragraph 8.2:

> "Hydro potential exists in the Ngakawau and Ahaura Gorge Ecological Area proposals but there is [sic] no immediate plans to develop these resources. The appropriate strategy to deal with this recource [sic] conflict would be to evaluate any development proposal at the time it is formulated. If the economic benefit of the development were then seen to outweigh the values seen for reservation, the statutory procedures for revoking all or part of the reserve could be invoked."

The report contained a recommendation in paragraph 10:

> "(g) that it is noted that prospecting and mining and investigation of other resources is permitted within all categories of reserve proposal with the consent of the responsible Minister, and that where an economic project is identified, the reservation or part of it can be revoked if the economic values are considered to outweigh the reservation values;"

The agreement followed a recommendation of a Cabinet Policy Committee at a meeting of 4 November 1986 which for present purposes accepted the recommendations in the report.

For the defendant it is said that the report was made in the context of the legislation then existing and that the

Act, which was passed on 31 March 1987 and came into force on 1 April 1987, was consequent to it. It is also said for the defendant that there were certain differences between what was the then proposal in respect of a hydro-electric scheme drawing water from the Ngakawau and Orikaka Rivers and the present. The scheme then proposed was for 93 megawatts within the area covered by the West Coast Accord, whereas the plaintiff's scheme was for a 700 megawatt scheme, part of which was outside the coverage of the West Coast Accord.

I have to note, however, that the plaintiff's submission is that at the present time it is only concerned with advancing Stage I of the scheme of 400 megawatts. It is unclear to me whether or not the area involved in Stage I of the scheme goes beyond the area covered by the West Coast Accord or not.

Secondly, it is noted for the defendant that, whilst the Blakely report referred to revocation of reserve status, the plaintiff's proposal requires more than revocation of reserve status by transfer of the land out of Crown ownership, and it is said that even the plaintiff accepts that that can only be done in accordance with the provisions of the Act.

The question is in two parts. The first part is whether the Minister was required to have regard to the West Coast Accord in deciding whether or not to dispose of the land. It is accepted that there was no contractual obligation upon the Minister to have regard to the Accord. It is said, however, that the statements in the Accord

endorsed by Government were made for the benefit of those who might identify economic projects on reserved land and was a clear indication to such persons that if they could demonstrate economic values outweighed reservation values the reservation could be revoked.

With all respect to the submissions for the plaintiff, I have already held that the Minister under the Act is required to give consideration solely to conservation purposes and not to purposes to which the land could be put upon its disposal. He is not required to have regard to matters such as the West Coast Accord or any other considerations which might be regarded by some party with an interest in the land as of possible relevance. I would note in particular that if the Legislature had intended that the Act should be read subject to the West Coast Accord it would have been very simple for the Legislature to have so provided. The Legislature did not so provide, either in the Act itself or in the various amendment Acts which have been passed at subsequent dates. There is no basis upon which the Court could take the view that the Minister is obligated to look at documents outside the legislation for determining the application of the legislation when it is clear in its terms.

The second part of the question is whether the plaintiff would have legitimately expected the Minister to have regard to the West Coast Accord. I can only give a limited answer to that question. Much of the argument before me would turn upon the facts of the case. Some but not all of those facts are agreed. I do not intend to draw

inferences or make assumptions which could be wrong in fact when the evidence was fully heard and considered. Nor do I intend to embark upon any consideration of the plaintiff's possible legitimate expectations in respect of the Minister viewed generally. The only limited answer that I intend to give to the question is that the plaintiff could not have legitimately expected the Minister to have regard to the West Coast Accord in considering whether to dispose of the land under the Act or not as it would not have been a relevant consideration for the Minister in making his determination under the Act.

QUESTION 4

> "Does section 40 of the Public Works Act 1981 apply to the disposal of the land sought by the plaintiff?"

This question involves a consideration of certain of the provisions of the Public Works Act 1981 when read in conjunction with the Act. In particular it requires a consideration of the definition of "Government work" under s. 2 of the Public Works Act, it being accepted that, if the deemed stewardship area with which this case is concerned comes within the definition of a Government work, it is a public work for the purposes of the Public Works Act. It also requires consideration in particular of s. 40 of that Act.

> Section 2:
>
> "'Government work' means ...; and includes land held or to be acquired for the purposes of the Conservation Act 1987 or any of the Acts specified in the First Schedule to that Act, even where the purpose of holding or

acquiring the land is to ensure that it remains in an undeveloped state"

Section 40:

"(1) Where any land held under this or any other Act or in any other manner for any public work -

(a) Is no longer required for that public work; and
(b) Is not required for any other public work; and
(c) Is not required for any exchange under section 105 of this Act -

the chief executive of the *Department of survey and Land Information* or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.

(2) Except as provided in subsection (4) of this section, the chief executive of the *Department of Survey and Land Information* or local authority, unless -

(a) He or it considers that it would be impracticable, unreasonable, or unfair to do so; or
(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held -

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person -

(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) If the chief executive of the *Department of Survey and Land Information* or local authority considers it reasonable to do so, at any lesser price.

(2A) If the chief executive of the *Department of Survey and Land Information* or local authority and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the parties may agree that the price be determined by the Land Valuation Tribunal.

(3) Subsection (2) of this section shall not apply to land acquired after the 31st day of January 1982 and before the date of commencement of the Public

Works Amendment Act (No. 2) 1987 for a public work that was not an essential work.

(4) Where the chief executive of the *Department of Survey and Land Information* or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

(5) For the purposes of this section, the term 'successor', in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person."

Sections 41 and 42 of the Act could be of relevance to the issue. Section 41 specifically provides for the disposal of Maori freehold land or general land owned by Maori as those terms are defined in s. 4 of Te Ture Whenua Maori Act 1993.

Section 42 deals with the disposal of land not required for public work which does not have to be dealt with under s. 40 or s. 41. It is the submission of the plaintiff that in the present case the land would fall within s. 42 and could be disposed of under that section, assuming the land is to be treated at all as a public work.

It is, however, the submission for the plaintiff that s. 40 of the Public Works Act does not apply to the land in question. First, because it is not the case that the land is no longer required for conservation purposes or any other conservation purposes or for any exchange under s. 105 of the Public Works Act. Secondly, it is submitted that, even if s. 40 did technically apply, the land was not acquired in

the sense envisaged by the Public Works Act and that it would be unreasonable or impracticable to offer it back to the person from whom it was acquired under s. 40 and that the land could therefore be best disposed of under the Land Act 1948 pursuant to s. 42(3) of the Public Works Act. Thirdly, it is submitted that s. 40 is not an absolute impediment to the sale of the land to the plaintiff under the Act and it is not a reason for declining to even consider the plaintiff's factual information.

There is evidence before the Court that the land in question was acquired by the Crown pursuant to a deed dated 21 May 1860 executed by the Chiefs and People of the Tribe Ngaitahu whose names are subscribed to the deed on behalf of themselves, their relatives and descendants. I do not know whether any other Maori interests have any claim to the land.

With all respect to the submissions for the plaintiff, it seems to be clear that the land in question comes within s. 40(1) in that it is plainly land held for the purposes of the Act and thus comes within the definition of "Government work". Equally plainly, given the interpretation placed by me upon the Act, it can only be disposed of by the Minister if it is no longer required for conservation purposes. In that event it would come within the clear language of s. 40(1) of the Public works Act.

Whilst the plaintiff invites me to expand the scope of the question by looking at the appropriate answer should it be determined the land comes within s. 40 of the Public Works Act, I am not disposed to do so. This is not a case

such as Auckland City Council v Taubmans (New Zealand) Ltd [1993] 3 NZLR 361, where it was appropriate for the Court to consider the issue. In the present case questions would arise as to whether the land was Maori freehold land or Maori customary land or general land owned by Maoris. It is certainly not appropriate that this Court enter upon any consideration of such an issue when Maori peoples with a possible interest in that issue are unrepresented, particularly having regard to the provisions of s. 4 of the Act and the specific provisions of s. 41 of the Public Works Act.

It is unnecessary for present purposes to set out the provisions of s. 129 of the Te Ture Whenua Maori Act 1993 dealing with the definitions of Maori land, certain categories of which have already been traversed above. Nor do I intend to enter upon what are in the first instance the obligations of the chief executive of the Department of Survey and Land Information under s. 40 in relation to the disposal of any land which the Minister may authorise to be disposed of under the Act.

The simple answer to this question is:

"Yes, s. 40 of the Public Works Act 1981 does apply to the disposal of the land sought by the plaintiff."

COSTS

Costs are reserved. The parties have been in court most of the day, and I received very full and extensive submissions in respect of the issues.

Solicitors for plaintiff:
Bell Gully Buddle Weir, Wellington

Solicitors for defendant:
Crown Law Office, Wellington

Investigating the future of conservation:
The case of stewardship land

August 2013

Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Paremata

Acknowledgements

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Photography

Cover: Mavora Park Conservation Area in Southland. This area is stewardship land and part of the Te Wāhipounamu World Heritage Area. Courtesy of Jill Ferry.

This report and other publications by the Parliamentary Commissioner for the Environment are available at: **www.pce.parliament.nz**

2.3 The origin of stewardship land

Much of the land given to the newly-created Department of Conservation was categorised as 'stewardship land'. This was land that did not have a specific protective classification (such as national park); nor was it seen to have productive value.[19]

The Minister's introductory statement to the Conservation Bill in December 1986 indicated an intent that stewardship land would function, in effect, as a neutral 'land bank' – it was to be *"land for which no end use has been decided".*[20] Some might be taken out of the conservation estate, and some might be reclassified into other categories of protected land.

As the Bill progressed through the House, questions were raised about the Government's intentions with regard to stewardship land. During the select committee process, a number of changes were made to the Bill that had the effect of altering the conception of stewardship land.[21]

In the Conservation Bill, stewardship land had been defined as land that was to be managed so that *"... its inherent character is largely unaltered."*[22] But this was changed to a requirement for its active protection. The Conservation Act 1987 states that stewardship land is to be managed so that *"... its natural and historic resources are protected."*[23]

Hon Philip Woollaston, Associate Minister of Conservation at the time, has explained what was expected to happen to stewardship land as follows.

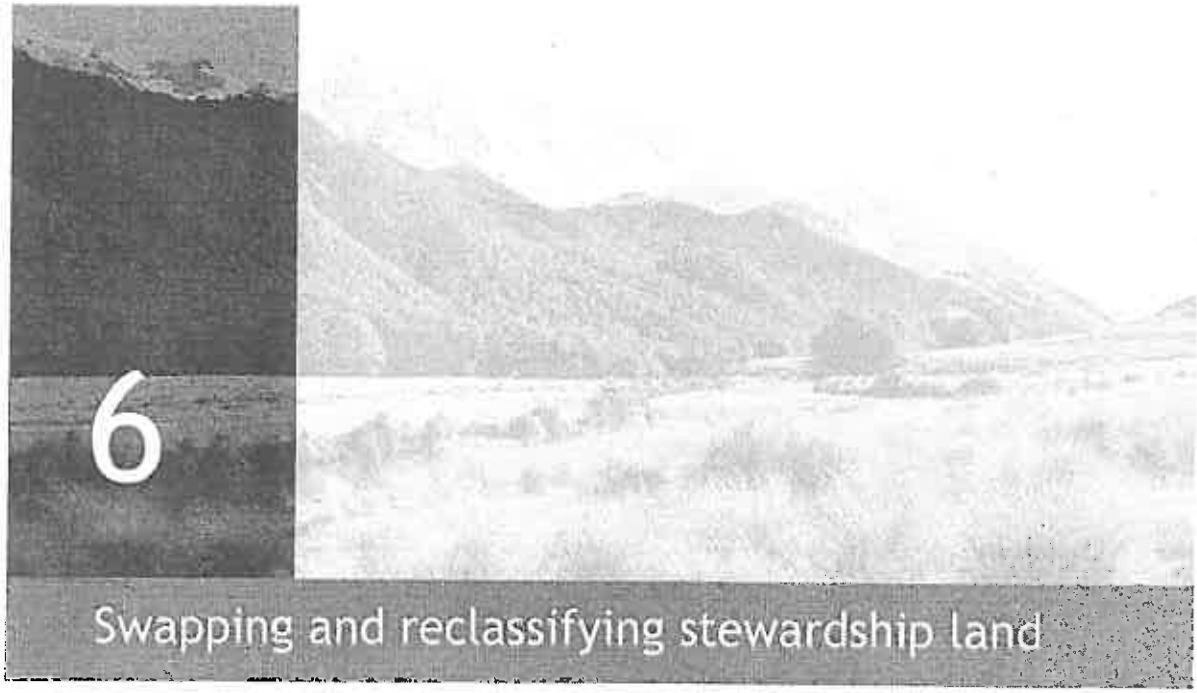
> *"The clear intention in creating stewardship areas was to protect them from development or extractive use until their conservation value could be established, the appropriate form of protection chosen...; unless of course the conservation values were found to be inadequate, when the area would be disposed of..."*[24]

Some evaluation, reclassification, and disposal has occurred, but not the systematic elimination of the stewardship category that was originally envisaged. Stewardship land remains as a generic category to be managed for the generic purpose of protecting natural and historic resources.

Two years after the Conservation Act was passed in 1987, it was amended. One addition was a section that allowed for areas of stewardship land to be exchanged for areas of private land.[25] Officials at the time advised that:

> *"The provision enables boundary adjustments to be made and is a useful tool to enable a speedy rationalisation of a conservation area".*[26]

No other changes of significance have been made to the law governing stewardship land. Today, it makes up almost one third of our conservation estate. Its value, however, has become an increasingly disputed subject, and recent use of the exchange provision for more than just boundary adjustments has proved controversial.



6 Swapping and reclassifying stewardship land

The two case studies in the preceding chapter have served to highlight two major issues associated with stewardship land – *land swaps* and *reclassification*.

There have been many swaps of stewardship land for private land that have been straightforward. However, the controversial land swaps outlined in Chapter 5 both involved trading a significant area of stewardship land with high conservation value for a very different area of private land – in the first case, a wild river gorge and in the second case an alpine basin – both for areas of lowland forest.

Areas of stewardship land can be reclassified into categories that reflect its conservation value and thus give it more appropriate protection. A proposal to reclassify the Mōkihinui Gorge as conservation park in 2008 came to naught. And the intent to reclassify Crystal Basin after it was added to the conservation estate was reversed in 2011.

The first section in this chapter examines the policies and processes associated with land swaps. The second section examines the policies and processes associated with land reclassification.

6.1 Swapping stewardship land

As described in Chapter 2, it became apparent soon after the Conservation Act was enacted that a simple process was required to allow DOC to adjust boundaries and rationalise small areas of conservation land.

The original proposal in 1989 was to provide for any category of conservation land to be swapped, regardless of its level of protection.[90] However, in the select committee process, this was changed to restrict land swaps to stewardship land.[91,92]

Reflecting its purpose, the 'exchange provision', as it is called, was kept simple and non-specific. There is a requirement to consult the local Conservation Board, but not the public. Then the Minister has only to be satisfied that a land swap will *"enhance the conservation values of land managed by the Department"* and promote the purposes of the Act.[93]

However, as the two case studies illustrate, there is a move to use land swaps in more complex situations than rationalising boundaries. Such situations may involve larger areas of stewardship land with high conservation value.

In such cases, the need to ensure the value of the conservation estate is *"enhanced"* – i.e. there is a net conservation benefit – becomes challenging. This was recognised in the discussion document *"A Bluegreen Vision for New Zealand"* which proposed that the New Zealand Conservation Authority be given a mandate *"to make decisions on the basis of net conservation benefit"*.[94]

Source: Parliamentary Commissioner for the Environment archives

Figure 6.1 Repeated freezing and thawing has created the shattered landscape of the Raglan Range, east of Nelson Lakes National Park. The range is stewardship land.

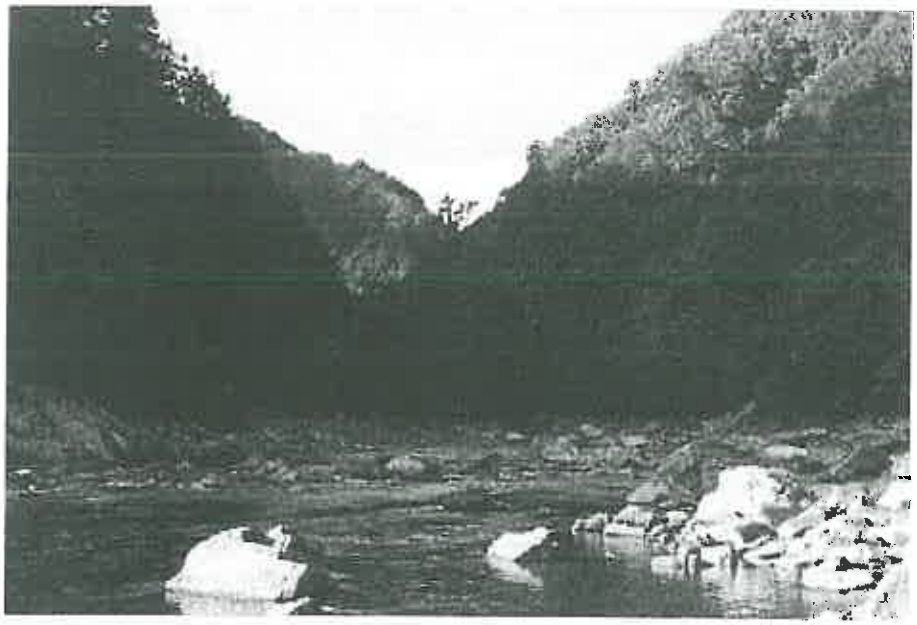
The land swaps in the two case studies went far beyond adjusting boundaries. In the Mōkihinui case, assessing net conservation benefit required comparison of a wild and scenic river gorge with three areas of lowland forest on the West Coast. In the Crystal Basin case, assessing net conservation benefit required comparison of an alpine basin with a forested gully on Banks Peninsula.

Comparisons of this kind will always be difficult unless one area of land has obviously low conservation value and the other has obviously high conservation value. This does not make it impossible to assess net conservation benefit, but it should be done in accordance with a clearly articulated set of principles.

Unfortunately, the guidance provided in DOC's Conservation General Policy is not up to the task. The policy contains one set of principles for both acquisitions and exchanges. As a result the principles focus on the *gains* of a land swap, but provide little guidance on how to evaluate the *losses*.[95] Consequently there is little guidance on how to compare gains and losses in a complex exchange.

Another issue is that only the net benefit to the *conservation estate* can be considered, and this may not be the same as a net benefit to *conservation*. The law is blind to conservation protection outside of land managed by DOC.

In the Mōkihinui case, the conservation value of the river itself could not be taken into account in the land swap proposal because DOC does not 'administer' its riverbed. It is one of many rivers that flow through the conservation estate, yet in the eyes of the law are outside it. This makes no sense and compromises the management of the conservation estate.



Source: Oisin Duke

Figure 6.2 Because the bed of the river is not 'administered' by DOC, the value of the river was not considered in the proposed land swap.

In the Crystal Basin case, Steep Head Gully was already protected under local plans and the New Zealand Coastal Policy Statement. But this was not accounted for in the land swap proposal because Steep Head Gully was not inside the conservation estate.

The Crystal Basin case was complicated further by the inclusion of 'interests in land' in the exchange – the ski field company surrendered its lease to part of Craigieburn Conservation Park. The legality of this has not been tested.[96] Irrespective of the legal situation, it seems extraordinary that the right to lease land – a right that has been granted, not purchased – can be traded for ownership of other land.

In the Conservation Act, the exchange provision for stewardship land does not include a requirement for public consultation.[97] In contrast, exchanges of reserve land, disposals and reclassifications all go through a public consultation process. Similarly, all significant applications for commercial use require public consultation. And the Government has recently made changes to the Crown Minerals Act to require public notification of significant access agreements for mining on conservation land.[98]

There is no requirement for public consultation on land swaps

The exchange provision for stewardship land does require consultation with the local Conservation Board.[99] This is a useful and appropriate check on swaps involving the kinds of minor changes envisioned in 1989 when the provision was added to the Conservation Act. However, in cases that are not 'minor' and there is likely to be public interest in a land swap, the public should be consulted.

Collectively, these weaknesses make the exchange provision for stewardship land unsuitable for evaluating anything other than small, simple swaps. For anything more complex, both the law and departmental policy are far from adequate.

Notes

1 Often the term 'public conservation land' is used, but this does not distinguish the conservation land managed by DOC from the many reserves and parks owned and managed by councils. DOC also manages some marine reserves.

2 The conservation estate covers about 8.8 million hectares. As at May 2013, 2.8 million hectares was classified as stewardship land.

3 New Zealand Conservation Authority. April 2005. *General policy for national parks* (p. 9).

4 Conservation Act 1987, s25. Although the Conservation Act uses the term 'stewardship area', for land areas in this category, DOC calls them 'conservation areas' on signposts, publications and databases.

5 For example, in 1980, the International Union for the Conservation of Nature (IUCN) proposed that forest estates should be managed *"on the principle of stewardship, with commitment to maintain in perpetuity ecological processes, watersheds, soils and genetic diversity". IUCN. 1980. World conservation strategy: Living resource management for sustainable development* (para. 11, chapter 9).

6 The Resource Management Act 1991, for example, includes "*the ethic of stewardship*" in its list of priority considerations. This sits alongside the Māori concept of kaitiakitanga, which is often translated as stewardship, although the two concepts have different origins and connotations and are therefore not considered synonyms. RMA 1991, s7(a) and (aa).

7 Woollaston, P. 2011. Origins of the legislation and policy relating to minerals in conservation areas. *Policy Quarterly,* 7(1): p. 4.

8 Parliamentary Commissioner for the Environment. 2010. *Making difficult decisions: Mining the conservation estate.* Schedule 4 was added to the Crown Minerals Act in 1997 and restricts mining on some categories of conservation land. Schedule 4 land areas total about 40 percent of the conservation estate.

9 Parliamentary Commissioner for the Environment. 2012. *Hydroelectricity or wild rivers? Climate change versus natural heritage.*

10 The first report titled "*Stewardship land and DOC – the beginning*" was written by Hon. Philip Woollaston, Associate Minister of Conservation at the time. The second report titled "*Background and history of the development of the conservation estate in New Zealand*" was written by Guy Salmon, a leading environmental advocate.

11 The Right Hon. Mr. Seddon (Premier), Scenery Preservation Bill, Hansard Vol 126, 22 October 1903, p. 705.

12 Young, D., 2004, *Our Islands Our Selves: A History of Conservation in New Zealand*, University of Otago Press.

13 Premier Vogel speaking in support of the New Zealand Forests Bill in 1874. Cited in Wynn, G. 1977, Conservation and Society in Late Nineteenth-Century New Zealand, *New Zealand Journal of History* vol 11, no 2, 1977, p. 125.

14 Young, D., 2004, *Our Islands Our Selves: A History of Conservation in New Zealand*, University of Otago Press, p. 88.

15 New Zealand's first national park was Tongariro in 1887. The then paramount chief of Ngāti Tūwharetoa, Horonuku Te Heuheu Tukino, sought the Crown's protection for the mountains in order to save them from private European subdivision. The Crown took the opportunity to get full ownership of the land and satisfy growing demands for the Government's push for more areas for tourism and recreation. Tongariro with its mountain wilderness and scenic terrain fitted well with the new European romantic ideal of wilderness. Waitangi Tribunal, *The National Park District Inquiry Report*, Chapter 11.

16 Hon. Russell Marshall, 11 December 1986, Hansard, p. 6138.

17 Landcorp still exists and manages over a hundred farms owned by the Crown. Most of the forests managed by Forestcorp were eventually sold, and Crown Forestry continues to manage residual state commercial interests in forests.

18 The remaining part of the Department of Lands and Survey became Land Information New Zealand (LINZ), which continues to administer some Crown land, including the high country leases. The New Zealand Forest Service ceased to exist in 1987. The Wildlife Service was taken out of the Department of Internal Affairs and incorporated into DOC. DOC was also given the responsibility of protecting cultural and built heritage on reserved lands, although the Historic Places Trust continues to be the leading advocacy and protection authority. DOC is also responsible for marine reserves.

19 Most stewardship land came from the Department of Lands and Survey and the New Zealand Forest Service. The remainder came from a range of government agencies. This included redundant lighthouses from the Post Office, old schools from the Department of Education, and some land from New Zealand Railways. Some of the transfers took time to be completed – for example, the 300,000 ha of State forests on the West Coast were split between DOC and Timberlands in 1988-89.

20 Hon. Russell Marshall, 11 December 1986, Hansard, p. 6139.

21 Salmon, G. *Background and history of development of the conservation estate in New Zealand*, 20 May 2013, p.19. Available at www.pce.parliament.nz

22 Conservation Bill No. 90-1, cl 2.

23 Conservation Act 1987, s25.

24 Woollaston, P. *Stewardship Land and DOC - the beginning*, September 2012, p. 7. Available at www.pce.parliament.nz.

25 The original proposal, as discussed in Chapter 6, was that the exchange provision would apply to all categories of conservation land.

26 Conservation Law Reform Bill: Report to the Planning and Development Select Committee by Officials of the Department of Conservation, 27 October 1989, p. 46.

27 Information provided by DOC, 31 July 2013.

28 Recently the Nature Heritage Fund has been refocused to become *"an independent contestable fund … for voluntary protection of nature on private land"*. http://www.biodiversity.govt.nz/land/nzbs/pvtland/nhf.html

29 There has been a proposal to reclassify some of the area as national park. DOC. 2009. *St James Conservation Area operational plan* (p. 10).

30 Recreation Reserves (416 ha), Historic Reserves (6 ha), Scenic Reserves (2,867 ha), Nature Reserves (7 ha), Government Purpose Reserve (102 ha), Conservation Parks (325,798 ha), Stewardship Area (326,398 ha). Information provided by DOC, 5 August 2013.

31 See Chapter 4 for a description of exchange and disposal processes under the Conservation Act 1987. Reserves are an exception – land held under the Reserves Act 1977 can also be exchanged after public consultation (s15), or disposed of if its reserve status has been revoked (ss 24 and 25).

32 Under the Ramsar Convention. The Ramsar Convention is an international treaty for the conservation of wetlands. Other wetlands listed under the Ramsar Convention are the Waituna Lagoon in Southland, Farewell Spit in Tasman, Firth of Thames and Whangamarino Wetland in the Waikato, and the Manawatu River estuary.

33 DOC Southland Conservancy. 1999. *Stewart Island/Rakiura National Park investigation.* Report to the New Zealand Conservation Authority, p. 7.

34 Most of the rest was formerly the North-West Nelson Forest Park. Department of Conservation, 1993. *Northwest South Island National Park Investigation.* Report to the New Zealand Conservation Authority, July 1993. Nelson/Marlborough Conservancy Management Planning Series No.5. p 200. Appendix A: Schedule of Land in Investigation Area.

35 DOC. 2009. *Matiri Valley and Plateau, Kahurangi National Park.* Department of Conservation.

36 Legally these decisions are made by the Minister of Conservation, but in practice, the great majority are made by the Director-General or other DOC staff under delegated authority.

37 The Conservation General Policy does, however, guide the commercial use, classification, disposal and exchange of stewardship land, which is discussed in subsequent sections.

38 Map 8: Kawatiri Place conservation outcomes. DOC. 2010. *West Coast Conservation Management Strategy,* p. 197.

39 These include frameworks like the Natural Heritage Management System (NHMS) and the Destination Management Framework (DMF), standards, and technical tools like Freshwater Ecosystems of New Zealand (FENZ) database.

40 *Land re-classifications – Stewardship areas.* Letter from Grant Baker for Director-General to the NZ Conservation Authority, 20 April 2005.

41 Conservation Act 1987, Part 3B.

42 Crown Minerals Act 1991, s61.

43 Department of Conservation, *Annual Report to 30 June 2012,* p. 41.

44 Some activities are directly prohibited; for example, heli-skiing in a wilderness area. Others are restricted in general policies, management strategies or plans. A concession will have conditions attached to it aimed at avoiding, remedying, or mitigating the effects of the activity on the conservation value of the land.

45 Conservation Act 1987, s17U(3).

46 Some categories, like wilderness areas, have very specific purposes in law. Others, like ecological areas, have less specific purposes in law, but the process of reclassification involves gazetting specific reasons for protection. For example the Orikaka Ecological Area was created to "*protect areas of low-altitude forests poorly represented in the Buller and Reefton Ecological Districts and important roroa/great spotted kiwi and other forest bird habitat*". New Zealand Gazette 28 June 2001.

47 Meridian Project Manager, quoted in "*Dam opponents take to the water*", Nelson Mail. 25 October 2010.

48 Institution of Professional Engineers NZ (IPENZ). 2011. *Realising our hidden treasure: Responsible mineral and petroleum extraction*, p. 14.

49 Conservation Minister Dr Nick Smith. 23 May 2013. *Denniston coal mine gains access approval.*

50 Crown Minerals Act 1991, Schedule 4. The Schedule lists a number of land categories considered to be incompatible with mining, including national parks, wilderness areas and nature reserves. Less than 1 percent of the land covered by Schedule 4 is stewardship land. It is on the Coromandel Peninsula, and on Great Barrier Island and other islands in the Hauraki Gulf.

51 The Crown Minerals Amendment Act 2013 changed the decision maker from the Minister of Conservation to both ministers. It also added a requirement for economic benefits to be considered and a requirement for public consultation. The Parliamentary Commissioner for the Environment published a report on this topic in 2010 called *Making difficult decision: mining on conservation land.*

52 Land classified as reserves can also be swapped under s15 of the Reserves Act 1977. However, such exchanges are subject to relatively tight restrictions and a public consultation process, and appear to have been limited to small boundary adjustments. Marginal strips can also be exchanged in limited circumstances.

53 Conservation Act 1987, s26(2). The High Court has clarified that the Minister of Conservation must be satisfied that the stewardship land is no longer required for conservation purposes before it can be disposed of. The Court also found that social and economic factors cannot be considered. *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344

54 Policy 6, *Conservation General Policy*. DOC. 2005.

55 Minister of Conservation, 19 August 2010, Response to Question for Written Answer 25988 (2010) from Kevin Hague MP to the Minister of Conservation.

56 Conservation Act 1987, s16A.

57 Exchanges are also used to rationalise high country conservation land following purchase or tenure review, and some have involved large areas. For example, in 2009, 1,408ha of pasture land acquired in the purchase of the Michael Peak pastoral lease was exchanged for 2,856ha of tussock land to improve the boundaries of the Otehake Conservation Park. The Otago Conservation Board supported the exchange. DOC. 2009. *Proposed land exchange – part Michael Peak Station for Timber Creek freehold land.* Otago Conservation Board report 0916, agenda item 9.4 for meeting of 18 September.

58 Department of Conservation. 3 October 2007. *Submission to Conservator Northland: Exchange of land – Kerikeri Airport – Far North Holdings Ltd.* PAL-06-01-08, Case No. 07/28.

59 DOC. 11 April 2011. *Submission to Minister of Conservation (Delegated to Conservator): Exchange of conservation land for other land.* PAL-06-10-04, DOCDM-726139.

60 Conservation Act 1987 s18. Note that DOC uses the terms reclassification and recategorisation interchangeably. DOC. 2013. *SOP categorisation of protected areas manual v1*, p. 20.

61 Following the Crown Minerals Amendment Act 2013 the reclassification of stewardship land areas into categories of conservation land that are included in Schedule 4 must be approved by Cabinet (and then created by the Governor-General by Order in Council). The Conservation General Policy 6(b) sets out the basis for advice by DOC staff on potential reclassifications. The process for reclassification includes consultation with the public. Note that reclassification of national parks requires an Act of Parliament.

62 DOC. 1999. *Land status changes: Advice to the NZ Conservation Authority meeting on 13-14 October 1999,* p. 3.

63 This is prompted in a template for all new conservation management strategies prepared by DOC in 2012. *"Policy 3.1.3: Ensure the classification or statutory purpose of public conservation land and water reflects its values. [List Places that are a priority for reclassification either in a table here or in Part Two and explain why the lands/waters should be reclassified.]"* DOC. 2012. *CMS template – final.* DOCDC-1142993, p. 30.

64 DOC, 2012, Conservation Management Strategy Waikato Conservancy 2014-2024, Draft December 2012, volume 1, policy 2.2.19, p.62.

65 DOC, 2012, Conservation Management Strategy Auckland Conservancy 2014-2024, Draft December 2012, volume 1, policy 2.6.12, p.66.

66 Meridian Project Manager, quoted in *"Dam opponents take to the water"*, Nelson Mail. 25 October 2010.

67 Under the Conservation Act 1987 such permission is given (or not) by the Minister of Conservation. In practice, such decisions have usually been made by DOC staff under delegation from the Director-General of Conservation acting under delegation from the Minister.

68 *Submission to Minister of Conservation: Delegated to the Conservator on the proposed Mōkihinui exchange.* Final draft, undated, PAL 06-11-38.

69 The gorge is bordered by stewardship land. Further inland the river flows through an ecological area. Between the gorge and the sea, the river flows through private land.

70 Three areas of land were collectively offered in exchange for the gorge. The first was Sawyer's Creek, a 711ha coastal ridge block north of the Mōkihinui River mouth, adjacent to a protected ecological area and scenic reserve. The second was Podge Creek, a 69. ha area containing stands of tall forest, east of Seddonville. The third was Waimangaroa Bush, 13.5ha of broad-leaved forest, about 30 km south of the mouth of the Mōkihinui River; this was assessed as having high conservation value. Overall, DOC believed the 794ha of freehold land offered in exchange by Meridian had only moderate conservation values. *Submission to Minister of Conservation: Delegated to the Conservator on the proposed Mōkihinui exchange*. Final draft, undated, PAL 06-11-38.

71 "... *[T]he bed of the Mokihinui River is not part of the public conservation land included within the exchange. However, the freshwater values of the tributary steams flowing through the conservation land are required to be considered in assessing the exchange.*" Submission to Minister of Conservation: Delegated to the Conservator on the proposed Mōkihinui exchange. Final draft, undated, PAL 06-11-38.

72 See Parliamentary Commissioner for the Environment. 2012. *Hydroelectricity or wild rivers: Climate change versus natural heritage* (p. 64). In this report, the Commissioner recommended that DOC officials be directed by the Minister to investigate transferring the administration of riverbeds located within conservation land from LINZ to DOC.

73 The $1.4 million total cost comprised $356,726 for preparing and giving evidence at the resource consent hearing, $1,055,728 preparing for the appeal to the Environment Court, and $22,247 for considering the proposed land exchange. Letter to the Parliamentary Commissioner for the Environment received from DOC, 28 June 2013. The Royal Forest & Bird Protection Society (Forest & Bird), WhitewaterNZ, and the West Coast Environment Network also appealed the decision.

74 In February 2008, DOC had submitted a conservation park proposal covering the Mōkihinui Gorge to the Minister of Conservation. The proposed Kawatiri Heritage (Conservation) Park would have included 147,000ha of conservation land (half stewardship land and half ecological area). The Minister was given options to approve, amend or decline the proposal, but it appears that no decision was made. DOC. 7 February 2008. *Declaration of the Kawatiri Heritage (Conservation) Park. Departmental submission.*

75 *"However, our recent commercial review of the project determined it was not prudent to proceed further given the high costs and the risks of the process involved..."* Meridian Energy. 22 May 2012. *Meridian exits Mokihinui Hydro Project.* Meridian press release.

76 Porters Ski Area is operated under a concession in the form of a lease from DOC.

77 In a letter from the Nature Heritage Fund to the Minister of Conservation on 3 May 2004. See DOC. 8 February 2011. *Departmental submission to Minister of Conservation: Blackfish exchange proposal*, p4.

78 Negotiations between DOC and Blackfish continued for some time. DOC sought advice about the viability of a 49–60 year lease (a form of concession) instead of an exchange. Blackfish advised DOC that the development could not go ahead with a lease because they believed they would not be able to secure funding for the project. DOC. 21 February 2011. *Submission to the Director General,* Report on a proposed exchange under Section 16A of the Conservation Act 1987 – Crystal Valley – Steep Head Gully, Upper Porters Valley, Crystal Stream., pp. 22-23.

79 Blackfish's application contained 20 separate documents including 5 consultant reports. DOC's report contained 10 technical staff reports and 3 consultant reports. DOC. 21 February 2011. *Submission to the Director General,* Report on a proposed exchange under Section 16A of the Conservation Act 1987 – Crystal Valley – Steep Head Gully, Upper Porters Valley, Crystal Stream., pp. 1-3

80 DOC. 21 February 2011. *Submission to the Director General,* p. 6.

81 Letter from Director-General of Conservation to Blackfish Limited dated 11 March 2011. The package finally agreed to included 10 years of weed and pest control in Steep Head Gully, a public access easement over Crystal Basin, and a memorandum of encumbrance to protect conservation values.

82 DOC. 8 February 2011. *Departmental submission to Minister of Conservation: Blackfish exchange proposal*, p4. This submission was signed by the Minister on 21 March 2011.

83 DOC. 21 February 2011. *Submission to the Director General,* Report on a proposed exchange under Section 16A of the Conservation Act 1987 – Crystal Valley – Steep Head Gully, Upper Porters Valley, Crystal Stream, p. 23.

84 The Canterbury Aoraki Conservation Board was consulted as required by section 16A(2) of the Conservation Act 1987. Williams, D. 10 August 2010. DOC mulls ceding 200ha for field. The Press.

85 DOC. 21 February 2011. *Submission to the Director General*, Report on a proposed exchange under Section 16A of the Conservation Act 1987 – Crystal Valley – Steep Head Gully, Upper Porters Valley, Crystal Stream., p. 24. The Nature Heritage Fund was consulted due to its role in the original purchase for the Crown.

86 The Ngāi Tahu Claims Settlement Act 1998 gives Ngāi Tahu 'first right of refusal' when Crown land is sold in its rohe, but has a list of exceptions. Land exchanges under s16A of the Conservation Act 1987 is an exception. DOC. 21 February 2011. *Submission to the Director General,* Report on a proposed exchange under Section 16A of the Conservation Act 1987 – Crystal Valley – Steep Head Gully, Upper Porters Valley, Crystal Stream, p 28. On 21 December 2010, the Canterbury Conservator wrote to Te Rūnanga o Ngāi Tahu agreeing that "*some clarification of exchanges in relation to the Ngāi Tahu Settlement Act 1998 would be useful, but probably would not be resolved before this particular proposal was considered.*" DOC. 8 February 2011. *Departmental submission to Minister of Conservation: Blackfish exchange proposal,* p 5.

87 The exchange provision in the Conservation Act 1987 (section 16A) enables exchanges of *"land"*, but does not mention *"interests in land"*. In contrast, the disposal provision (section 26) explicitly enables disposal of both *"land"* and *"interests in land"*.

88 Letter from Forest & Bird to the Director-General of Conservation, 16 August 2010. However, Forest & Bird did not challenge the eventual decision through a judicial review, so the legality of the land swap has not been tested in court.

89 The land swap did result in some increase in protection to Steep Head Gully – Blackfish committed to fencing out stock and to ten years of weed and pest control. However, Steep Head Gully is managed under various policies as an indigenous coastal forest. At the national level the New Zealand Coastal Policy Statement 2010 has part of the purpose of Objective 1 as *"protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna"*. In the Banks Peninsula District Plan, Steep Head Gully is classified as an Interim Outstanding Natural Features & Landscape Protection Area. This category represents *"those areas with the most significant values assessed in relation to the statutory requirements of Section 6(b) of the Resource Management Act and which require protection from inappropriate development and subdivision"* (Chapter 13, Banks Peninsula District Plan).

90 Conservation Law Reform Bill 1989, cl 11.

91 Conservation Act 1987, Section 16A is the exchange provision for stewardship land. An exchange provision was also introduced for 'marginal strips' – narrow strips of land alongside rivers allowing public access (s24E). Conservation land classified as reserves can also be exchanged; the provision for this is section 15 of the Reserves Act 1977 which predates the Conservation Act.

92 Environmental organisations objected strongly to clause 11 in the amendment Bill – *"... this proposal was not intended to be applied to all classes of conservation land. In particular, it was not to apply to protected land but only to stewardship land."* Section 7.2, Submissions on behalf of the Maruia Society in respect of the Conservation Law Reform Bill, PD/90/99. *"Conservationists will not be satisfied with the provisions that are made in this Bill ... especially in regard to: 1) the freedom given to the Minister to dispose of by exchange, any conservation area, protected areas included."* Section IV.10, Environment and Conservation Organisations of New Zealand, 12 September 1989.

93 Conservation Act 1987, s16A(2).

94 A Bluegreen Vision for New Zealand, Discussion paper by Hon Dr Nick Smith MP, 2006.

95 See Conservation General Policy – Policy 6: Changes to public conservation lands. The principles for making decisions on *exchanges* of land are the same as the principles for making decisions on *acquisitions* of land. Consequently, only the gains from an exchange are to be considered.

96 The provision for the *disposal* of stewardship land (s26) explicitly includes *"any interest in any land"*, but the provision for the *exchange* of stewardship land (s16A) does not. Yet the legal advice received by DOC in the Crystal Basin case was that the legal definition of 'land' includes 'interests in land', and so a land swap can include the latter.

97 Conservation Act 1987, s16A(7): *"Nothing in section 26 [disposal] or section 49 [public consultation] shall apply to the exchange of land under this section."*

98 Crown Minerals Amendment Act 2013, Section 42(2).

99 Conservation Act 1987, s16A(2). In 1989 when the Conservation Law Reform Bill was under consideration, DOC advised the select committee that the Minister was unlikely to proceed with a land swap if the local Conservation Board opposed it. Conservation Law Reform Bill: Report to the Planning and Development Select Committee by Officials of the Department of Conservation, 27 October 1989, p. 47. The proposed Mōkihinui and Crystal Basin land swaps were strongly opposed by the West Coast Tai Poutini Conservation Board and the Canterbury Aoraki Conservation Board respectively.

100 Woollaston, P. 2011. Origins of the legislation and policy relating to minerals in conservation areas. *Policy Quarterly,* 7(1): p. 4.

101 DOC. 2013. *A more systematic approach to identifying conservation priorities.*

102 Moreover, some of the most rare and endangered of these ecosystems are on stewardship land. A technical report accompanying DOC's annual report concludes that *"improved conservation status is merited"* where more than 20% of the threatened ecosystem is classed as stewardship land. Landcare Research. 2012. *Department of Conservation biodiversity indicators: 2012 Assessment*, p. 39; and DOC. 2012. *Annual report for the year ended 30 June 2012*, p. 20.

103 Prime Minister Helen Clark. 8 October 2008. *Government protects magnificent high country property.* Press release.

104 There are two other World Heritage sites in New Zealand – Tongariro National Park and the Sub-Antarctic Islands. World Heritage List. http://whc.unesco.org/en/list. [Accessed 30 July 2013]

105 DOC. 2007. *Te Wāhipounamu – South West New Zealand World Heritage Area.*

106 DOC. 2005. *Conservation General Policy.* Policy 6(b), p. 30.

107 Since 1999, reclassifications that would *"bring the status of the land more accurately into line with its values (i.e. reflect its legislative fit)"* are *"lower priority"*. DOC. 2013. *SOP categorisation of protected areas manual v1* (p. 25).

108 These reasons emerged during interviews with DOC staff and were confirmed in an email exchange on 18 July 2013.

109 A recent change to the law to require approval by Cabinet (rather than the Minister of Conservation) for any reclassification that would prohibit mining (i.e. be covered by Schedule 4 of the Crown Minerals Act) has also made the process of reclassifying into some categories more onerous (Conservation Amendment Act 2013, s6).

110 For example, a DOC manager reportedly described St James Conservation Area – a large area purchased by the Crown in 2008 that has been left as stewardship land – as *"a test case for a new, more commercially driven approach to the South Island scenic splendour, one where DOC is being challenged to see green values, recreation and economic development going hand in hand"*. McCrone, J. 6 November 2008. Unexplored playground. The Press.

From Hawke's Bay Conservation Management Strategy

Section 3.7 LAND ADMINISTRATION

The Department has a number of statutory responsibilities under the Conservation Act and Reserves Act in respect of land it administers. These actions include acquisition of land, exchanges of land, classifications of reserves, disposal of land and setting apart of land for conservation purposes. It is also required by legislation to process certain applications on behalf of clients such as local authorities. This is undertaken on a cost recovery basis and is client driven.

The Reserves, Conservation and Wildlife Acts contain provisions for the classification of lands. The purpose of protected areas classification is to ensure there is adequate control and management and appropriate levels of development and preservation for different areas managed by the Department. Protected area status can be significant in determining how an area is perceived by the public, and the level of use it receives.

The reserves classification exercise for Hawke's Bay Conservancy was undertaken by the former Department of Lands and Survey. However, there is a need to review the status of many other areas, as the existing status may not necessarily reflect their natural values. There are several large conservation areas adjoining Ruahine and Kaweka Forest Parks which the Department considers should be included in the Parks, and a number of other areas throughout the Conservancy which require investigation. Also, there are some reserves under departmental control which may be more appropriately managed through being vested in a territorial authority. Conversely there are other reserves, which are currently vested in, or controlled and managed by other authorities which may be more appropriately managed directly by the Department.

Disposal of most areas managed by the Department is subject to public notification, with many of the required approvals and consents being the responsibilities of other agencies. Departmental Land Disposal Guidelines and Procedures set out the rationale for disposal, and procedures to be followed in this process.

It is envisaged that the number of cases to formally set areas of land apart for conservation purposes will diminish over the next few years. However, it is expected that more time will be devoted to administration of protected private land agreements and covenants following the completion of stage one of the Protected Natural Areas programme for the Conservancy (see Section 3.2.2).

OBJECTIVE

To achieve the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department.

IMPLEMENTATION

i The Department will formulate a register of potential areas for status investigation.

ii The Department will review the status of areas under its management and proceed to appropriately alter them if necessary. This may result in a change of status to give greater protection to natural or historic values, or it may result in disposals or exchanges of lands which have low natural or historic value.

iii The Department will ensure that reserves (including those controlled and managed by other organizations) are managed for their primary purpose.

iv The Department will review vested reserves in the Conservancy and will endeavour to cancel the vesting if desirable in terms of protection of natural or historic values. It will also consider whether some reserves would be more appropriately vested in other authorities.

v The Department will review all areas which are currently controlled and managed by other authorities to determine whether they may be better controlled directly by the Department.

vi The Hawke's Bay Conservancy will, in conjunction with shared staff in Wanganui, develop an effective checking mechanism for entries in the National Land Register.

vii All long-outstanding exchanges and allocations of land will be identified with a view to completing them. (All of these were the subject of previously negotiated agreements by the Department's parent organizations, which at that time had gone through the necessary approvals).

3.7.1 Implications for Specific Places in the Conservancy

The above objective and implementation provisions apply across all areas of the Conservancy. Investigations into the appropriate classification for Waitere Kiwi Conservation Area (see Section 2.3) and Stoney Creek and Tarawera Conservation Areas (See Section 2.2) are priorities, as are the proposed inclusions in the Ruahine and Kaweka Forest Parks of the numerous conservation areas surrounding them (see Section 2.1).

Department of Conservation
Te Papa Atawhai

Conservation General Policy: Conservation General Policy - 6. Changes to Public Conservation Lands

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6. Changes to Public Conservation Lands

Public conservation land is held under a range of legislation and classifications (e.g. national parks, conservation parks, stewardship areas, scenic and other reserves, and wildlife refuges; see Appendix 1). Its management was brought together in 1987 when the Department of Conservation was established. Additions to public conservation lands since 1987 have improved their representativeness and increased the area of New Zealand protected for future generations. This chapter covers further land acquisitions and exchanges, and potential changes to land classification or land disposal to adjust the level of legal protection.

This chapter refers only to public conservation lands. Marine protected areas are covered in 4.4.1, and conservation beyond public conservation lands is covered in chapter 7.

POLICIES

6 Changes to Public Conservation Lands

6 (a) Land acquisition or exchange (including boundary changes) may be undertaken to manage, for conservation purposes, natural resources or historical and cultural heritage; or for the benefit and enjoyment of the public, including public access, where the land has international, national or regional significance; or where land acquisition or exchange will either:

- i. improve representativeness of public conservation land; or
- ii. improve the natural functioning or integrity of places; or
- iii. improve the amenity or utility of places; or
- iv. prevent significant loss of natural resources or historical and cultural heritage; or
- v. improve the natural linkages between places; or
- vi. secure practical walking access to public conservation lands and waters, rivers, lakes or the coast; or
- vii. achieve any other purpose allowed for under the relevant Acts.

6 (b) Subject to statutory requirements, the classification of any public conservation lands may be reviewed from time to time to ensure that the classification of such lands continues to either:

- i. give appropriate protection and preservation for their natural resources, and/or historical and cultural heritage; or
- ii. give appropriate protection and preservation for their educational, scientific, community, or other special features, for the benefit of the public; or
- iii. enable integrated conservation management identified in conservation management strategies or plans; or
- iv. provide for access and enjoyment by the public where that is in accordance with the purposes for which the land is held; or
- v. reflect the values of public conservation lands that are present; or
- vi. enable specified places to achieve conservation outcomes in the future.

6 (c) Land disposal may be considered where the legislation to which it is subject allows for disposal and the land has no, or very low, conservation values.

6 (d) Subject to policy 6 (c), land disposal should not be undertaken where the land in question either:

- i. has international, national or regional significance; or
- ii. is important for the survival of any threatened indigenous species; or
- iii. represents a habitat or ecosystem that is under-represented in public conservation lands or has the potential to be restored to improve the representation of habitats or ecosystems that are under-represented in public conservation lands; or
- iv. improves the natural functioning or integrity of places; or
- v. improves the amenity or utility of places; or
- vi. improves the natural linkages between places; or
- vii. secures practical walking access to public conservation lands and waters, rivers, lakes or the coast.