IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-781
[2016] NZHC 220

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Applicant
AND	MINISTER OF CONSERVATION First Respondent
	HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED Second Respondent

Hearing: 8 December 2015

Counsel: I T F Hikaka and S R Gepp for Applicant
J Prebble and S Bradley for First Respondent
M J E Williams and T P Robinson for Second Respondent

Judgment: 19 February 2016

JUDGMENT OF PALMER J

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Summary

[1] This case goes to the heart of the purpose of the Conservation Act 1987 (the Act). The Director-General of Conservation has revoked the status of 22 hectares of specially protected land in the Ruahine Conservation Park, required for the proposed Ruataniwha dam, in order to swap it for 170 hectares of land to be added to the Park. He considered this would enhance the conservation values of land managed by the Department and promote the purposes of the Act. Forest & Bird mounts three challenges.

[2] In relation to the first and central challenge I agree with Forest & Bird that the two decisions, to revoke the status of specially protected land so that it becomes stewardship land, and then to exchange the stewardship land for other land, must be legally distinct. However, I consider that it would be artificial and inimical to good public administration for the public submissions and the decision on revocation to be prevented by law from taking into account the proposed land exchange. What is required is that, in making the revocation decision, the decision-maker must satisfy himself or herself that there is a good and proper basis for the revocation founded in conservation purposes interpreted broadly. That is broader than being satisfied that an exchange will enhance the conservation values of land managed by the Department. On the evidence before me, although the focus of the decision paper on the exchange came perilously close to risking the wrong legal test being applied to the revocation decision, I consider the Director-General did satisfy himself of what was required. Accordingly, I dismiss this challenge.

[3] I also dismiss Forest & Bird's second challenge that the revocation decision was not in accordance with, and did not have regard to, two specific policies in the Conservation General Policy and the Hawke's Bay Conservation Management Strategy. I consider the two policies do not apply to the revocation decision. And I regard the third challenge, based on the failure to reserve marginal strips from sale or disposition, as premature. Marginal strips may have to be reserved. But there has not yet been a sale or disposition without such a reservation.

[4] Because Forest & Bird has competently and responsibly advanced legitimate arguments in the public interest I would be reluctant to award costs against them but would consider submissions from the parties on that matter if they wish me to do so.

Legislative Framework

[5] It is convenient to outline the legal framework first, since it frames the decision of the Director-General that is challenged here.

Context of Government Restructuring

[6] The Act was passed in the context of wide-ranging reform to the machinery of government. This included the State-Owned Enterprises Act 1986 which came into force the day after the Act was passed.[1] These measures were to be followed by wider state sector reform via the State Sector Act 1988 and the Public Finance Act 1989. Government organisations were restructured. The ownership and management regimes for government land and assets were reorganised. Land owned by the Crown, which had been administered by the Department of Lands and Survey and the New Zealand Forest Service, was allocated to new departments of the Crown, such as the Department of Conservation (DoC), transferred to new State-Owned Enterprises such as the Land Corporation Ltd (now Landcorp Farming Ltd) and proposed to be transferred to the New Zealand Forestry Corporation Ltd. Some six and a half million hectares were originally to be administered by DoC.[2]

Act's Purpose

[7] The long title of the Act refers to its purpose and a primary means to achieve it: "[a]n Act to promote the *conservation* of New Zealand's *natural* and historic *resources*, and for that purpose to establish a Department of Conservation".[3] The words in italics are defined in s 2(1) of the Act (in definitions which date from the original enactment):[4]

> 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
>
> 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

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1 The Conservation Act was passed on 31 March 1987 and, along with key sections of the State-Owned Enterprises Act 1986, came into force on 1 April 1987.

2 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 653.

3 (Emphasis added).

4 (Emphasis added).

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.

The Department of Conservation

[8] Section 6 of the Act, which (apart from s 6(ab)) also dates from the original enactment, confers specified functions on DoC and its Chief Executive, the Director-General of Conservation. Broadly, subject to enactments and any directions of the Minister of Conservation, DoC is required to manage land held under the Act for conservation purposes and to advocate for the conservation of natural and historic resources (as those terms are defined at paragraph [7] above):

6 Functions of Department

The functions of the Department are to administer this Act and the enactments specified in Schedule 1, 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, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:

(ab) to preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats:

(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; and

(ii) the conservation of the natural and historic resources of New Zealand's sub-antarctic islands and, consistently with all

relevant international agreements, of the Ross Dependency and Antarctica generally; and

(iii) international co-operation on matters relating to conservation:

(d) to prepare, provide, disseminate, promote, and publicise educational and promotional material relating to conservation:

(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:

(g) every other function conferred on it by any other enactment.

Conservation Areas

[9] This case is particularly concerned with Parts 3 to 5 of the Act that relate to several categories of conservation land.

[10] Part 3 is entitled "Conservation Areas"; a term which is defined in s 2(1) to mean, relevantly, "any land" that is "for the time being held under this Act for conservation purposes". Land may be declared by the Minister under s 7 (or otherwise statutorily deemed) to be held for conservation purposes, remembering that "conservation" is defined as noted at paragraph [7] above.

[11] Land ceases to be held for conservation purposes if, under s 8, it becomes a reserve, sanctuary, refuge or national park. Section 16 prohibits a conservation area from being disposed of, "except in accordance with this Act", though it allows a lease, licence or easement may be granted over a conservation area.

[12] Part 3A of the Act deals with "Management Planning". There, conservation areas are required by s 17A to be administered by DoC in accordance with statements of general policy approved by the Minister and conservation management strategies and plans prepared by the Director-General and approved by the Conservation Authority or Conservation Boards. Part 3B provides a regime for concessions, which are required for an activity to be undertaken within a conservation area.

Specially Protected Areas

[13] Part 4 of the Act deals with "specially protected areas" which include conservation areas declared to be held for specified purposes. So, for example, the Governor-General in Council may declare a conservation area to be held for the purpose of a wilderness area or sanctuary area (s 18AA). Or the Minister may declare a conservation area to be held for the purpose of a conservation park, ecological area (s 18) or watercourse area (s 23). Relevant to this case, a "conservation park" is required to be managed "in a manner consistent with the purpose" of a conservation park (s 18(5)) and so that "its natural and historic resources are protected" and, subject to that, "to facilitate public recreation and enjoyment".

[14] The purpose for which specially protected areas are held may be revoked (s 18(7)), in which case the Minister is required to give public notice of intention to do so (s 18(8)). Where public notice is given, any person or organisation may object or make submissions to the Director-General, and must be given a reasonable opportunity to appear in support of the objection or submission (s 49).

Marginal Strips

[15] Part 4A deals with marginal strips, which are 20 metre strips of land next to lakes and rivers that are reserved from any sale or other disposition of land by the Crown unless, for rivers less than 3 metres in width, exempted by the Minister.

[16] "Sale" is given a wide definition by s 2(1) to include "every method of disposition for valuable consideration, including barter …".

Stewardship Areas

[17] Finally a further category of conservation land is a "stewardship area" which is defined in s 2 by reference to what it is not:

> 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 1 or more purposes described in s 18(1); or

(d) land in respect of which an interest is held under this Act for 1 or more of the purposes described in section 18(1)

[18] Section 25 requires that "every stewardship area shall be so managed that its natural and historic resources are protected". This is the same requirement as one of the requirements for conservation parks but does not include the other requirement, to facilitate public recreation and enjoyment.

[19] Contrary to other conservation areas a stewardship area (that is not foreshore) may be disposed of by the Minister. Stewardship areas adjacent to a conservation area that is not a stewardship area may not be disposed of unless the Minister is 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" (s 26(2)). If a stewardship area is disposed of it ceases to be held for conservation purposes. Disposal of a stewardship area requires the Minister to give notice of intention to do so (s 26(3)) which requires any person or organisation to have the opportunity to object or make submissions on the proposal, and to appear in support of the objection or submission (s 49).

[20] Under a 1990 amendment to the Act, the Minister is also explicitly empowered to authorise the exchange of a stewardship area "for any other land" after consulting with the local Conservation Board and being satisfied that "the exchange will enhance the conservation values of land managed by the Department and promote the purposes of this Act" (s 16A). Such an exchange is explicitly not required to be the subject of public notice and submissions (s 16A(7)). The High Court, in *Buller Electricity Ltd v Attorney-General,* has made clear that "there is no basis upon which the Minister could sell or otherwise dispose of [stewardship land] unless he was satisfied that it was no longer required for conservation purposes".[5]

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5 *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 352.

Facts

[21] Here, the Director-General proposed to revoke the conservation area status of conservation park land so that it would become stewardship land. This was to enable him to dispose of the land in exchange for other land.

The Forest Park Land

[22] The land at issue here (the Forest Park land) is approximately 22.2 hectares, in several distinct parcels, in the Ruahine Forest Park. A DoC map in evidence, reproduced below, illustrates its location.[6]

[23] There is no dispute between the parties that the Forest Park land was part of the Ruahine Forest Park prior to passage of the Act, pursuant to a 1976 Gazette notice, and was not allocated for possible transfer to a State enterprise. The Forest Park land was therefore deemed, by a transitional provision of the Act, to be a conservation park (s 61(2)) and accordingly held for park purposes (s 2(2)) as well as being deemed to be land held under the Act for conservation purposes (s 61(9)). As such, it was unable to be disposed of unless it was declared to be held for conservation purposes under s 7(1) of the Act (s 61(9)).

[24] The Crown characterised s 61 as providing a "holding pen" for such land since, under ss 61(2)(c), (2)(d) and (9), it may further be declared to be held for conservation purposes or vested in a State Enterprise. Forest & Bird used the same term in its evidence and referred to the Minister's comments in the Parliamentary debates in 1986 to characterise stewardship land as a "holding category".[7] That characterisation may imply that its legal status is more tenuous than it is. Unless and until any such further action occurs, s 61 requires that the legal status of such land is that of a conservation park and of land held under the Act for conservation purposes. All the legal aspects of that status apply to the land.

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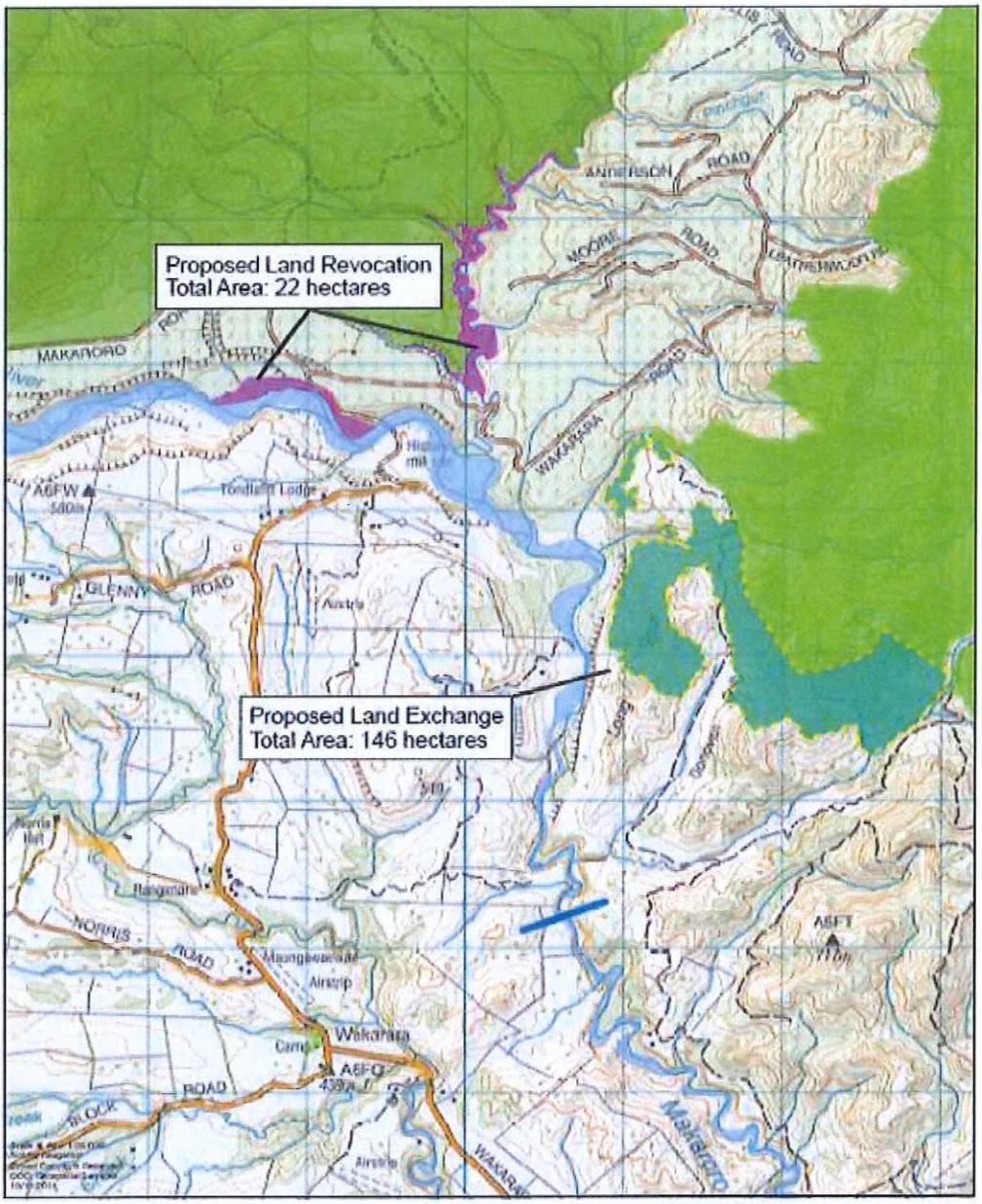
6 Department of Conservation "Ruahine Forest Park Land Revocation and Exchange Map".

7 Submissions and objections to the revocation proposal received up to 3 March 2015, in "Report and Recommendations from Hearing Convenor for Ruahine Conservation Park Change of Status Proposal", Reg Kemper (Director Conservation Partnerships & Hearing Convenor, DoC) to Lou Sanson (Director-General of Conservation) (22 September 2015) at 19.



Ruahine Forest Park Land Revocation and Exchange

Department of Conservation
Te Papa Atawbai
newzealand.govt.nz

The Water Scheme

[25] The second respondent, the Hawke's Bay Regional Investment Company Ltd (the Company), is wholly owned by the Hawke's Bay Regional Council. The Company has been pursuing the Ruataniwha Water Storage Scheme (the Ruataniwha Scheme), a proposal to capture and store approximately 90 million cubic metres of water within a dam across the Makaroro River, approximately 35km northwest of Waipawa.[8] This would enable irrigation of between 25,000 and 30,000 hectares of land, primarily on the Ruataniwha Plains in Central Hawke's Bay.

[26] The proposal would involve inundation of the Forest Park land. In June 2013 the Company sought a concession from DoC for the storage of water on the Forest Park land under an easement. A preliminary draft DoC report suggested that the application would be inconsistent with the Act and with the relevant Conservation Management Strategy.[9] At a meeting held on 18 July 2013 DoC suggested to the Company that such an application was unlikely to succeed and the parties discussed a land exchange as an alternative.[10]

[27] The Company then asked that the concession application be put on hold and began to pursue a land exchange proposal. The then Minister of Conservation, the Hon Nick Smith, publicly advised that such a proposal should await the Board of Inquiry process that included the Ruataniwha Scheme.

The Smedley Land

[28] The Company proposed to DoC that it exchange the Forest Park land for some 147 hectares of other land (the Smedley land), contiguous to the Ruahine Forest Park, from what is called the Smedley Block or Smedley Station. This land is also denoted on the map reproduced above.

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8 As described in a letter from Graeme Hansen (Project Manager, Ruataniwha Water Storage Scheme) to Marie Long (Manager, Planning & Permissions, Department of Conservation) regarding the land exchange (26 August 2014), at 1 and 3.

9 Arna Litchfield (Permissions Advisor, DoC) "Notified Concession Officer's Report to Decision Maker" (15 July 2013) at [8.0].

10 Affidavit of Arna Litchfield dated 25 November 2015 at [9] to [10]; see also contemporaneous notes and correspondence.

[29] The Smedley Block is held on trust under the Howard Estate Act 1978, administered by the Public Trust, for the development of the Howard Agricultural Institute (including the Smedley Cadet Training Farm), the farming, improvement and development of the farm land, and agricultural research and education. Under s 6 of the Howard Estate Act 1978, the Public Trust has the power to sell property with the prior consent of the Minister in charge of the Public Trust.

[30] The Company entered into an agreement in principle with the Public Trust to purchase the Smedley land in addition to land and land covenant areas required for the Ruataniwha Water Storage Scheme. The agreement was conditional on the land exchange being approved by DoC.[11]

The Process leading to Revocation and Exchange

[31] From August 2013 the Company and DoC conferred over a proposed methodology for a potential land exchange.[12] Kessels Ecology prepared two reports appraising the conservation values of the Forest Park land and the Smedley land.[13]

[32] On 26 August 2014, two months after the Board of Inquiry Report on a proposal including the Ruataniwha proposal, the Company wrote formally to DoC seeking authorisation of the proposed exchange.[14]

[33] From December 2014 DoC developed the intention to revoke the conservation park status of the Forest Park land to enable its exchange as stewardship land for the Smedley land. In particular, on 21 November 2014, Mr La Cock, a departmental Technical Adviser, produced a report as to whether there is an enhancement of conservation values by the proposed exchange. On the same day, DoC reported to the Minister of Conservation, by then the Hon Maggie Barry.

[34] The 21 November 2014 DoC report recommended that the Minister note "that the exchange process is conditional on the revocation of the conservation park

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11 Letter from Graeme Hansen to Marie Long, above n 8, at 5.

12 Affidavit of Andrew Newman dated 26 November 2015, at [69].

13 At [69]. See also Gerry Kessels & Mark Hasenbank (Kessels Ecology) "Hawke's Bay Regional Investment Company Limited Ruataniwha Water Storage Scheme: Smedley Exchange Block Ecological Survey" (2013).

14 Above n 8.

status" of the Forest Park land and recommended the Minister consider whether to retain or delegate the decision-making process.[15] The Executive Summary noted that:[16]

> The proposed exchange is dependent upon the revocation of the conservation park status and while the revocation and exchange are separate processes under the Conservation Act 1987 they are necessarily linked with the exchange being conditional on the revocation which would only be proposed in this circumstance to enable the exchange.

[35] The more detailed account in the submission summarised the separate steps of the process. First there would be:[17]

> A conditional decision, dependent on an intention to revoke conservation park status, that the land exchange should proceed. That will be on the basis that the proposed land exchange is likely to lead to an enhancement of conservation values over land managed by the department and promote the purposes of the Conservation Act.

[36] That would be followed by forming the intention to revoke the conservation park status, consideration of submissions or objections and a decision on revocation. The final step would be a decision on the exchange.

[37] On 1 December 2014, in considering the submission, the Minister of Conservation delegated to the Director-General of Conservation power to form the intention to revoke, and to revoke, the conservation status of the Forest Park land.[18] This decision was made on the basis that the Director-General may then sub-delegate those powers to the Deputy Director-General.[19]

[38] On 11 December 2014 Geoff Ensor, the Acting Deputy Director-General Conservation Partnerships, agreed to form a view that the land exchange should be progressed and agreed to form an intention to revoke the conservation park status for the Forest Park land and to give public notice of that intention.

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15 Submission by DoC to Minister of Conservation, 21 November 2014.

16 At 2.

17 At 4 (under "Details of the Process").

18 At 3.

19 On 22 January 2015 the Minister subsequently decided the decision should not be sub-delegated by the Director-General but, by then, the initial view that a land exchange should be progressed had already been formed by the Deputy Director-General. On 13 February 2015 the Minister revoked her agreement that the Director-General sub-delegate.

[39] DoC called for submissions on 12 December 2014.[20] On 10 March 2015 it convened a hearing on the proposed revocation decision. The Hearing Convenor was Reg Kemper who was then Director, Conservation Partnerships. In the course of the process the Hearing Convenor came to the view that he required further information about matters raised at the hearing, and subsequently requested DoC's Technical Advisors prepare a report gathering and evaluating information relating to the conservation values of both sites.[21] The report, dated 27 May 2015, reviewed the exchange of the Forest Park land for the Smedley land and involved biological data and technical information applicable to each.[22] The report concluded that exchanging the Smedley land for the Forest Park land would enhance the conservation values of land managed by the Department. The report was provided to the submitters and the Company on 5 June 2015. Further submissions were then made on that report.

Decision Papers and Decision

[40] In a report dated 22 September 2015, and signed on 24 September, the Hearing Convenor provided his recommendations to the Director-General, Lou Sanson, as the Minister's decision maker. He recommended that the Director-General note the summary of objections and comments, that the consultation requirements with Treaty partners had been completed and that the Director-General:

> (c) **Note** my view that the proposed exchange would enhance the conservation values of land managed by the Department, and would promote the purposes of the Act;
>
> (d) **Accept** my recommendations as to the extent to which the objections and submissions should be accepted or allowed, as set out in the table near the end of this report;
>
> (e) **Note** that if you intend to revoke the status of the RFP [Ruahine Forest Park] land to progress the exchange proposal you would first need to declare the RFP land to be held for conservation purposes pursuant to s 7(1) of the Act;

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20 Department of Conservation "Public submissions called on Ruahine land revocation proposal" (press release, 12 December 2014).

21 Affidavit of Reginald Kemper dated 27 November 2015, at [27].

22 Graeme La Cock, Geoff Rogers, Philippe Gerbeaux and Jessica Scrimgeour, Department of Conservation "Assessment of proposed land exchange between Ruahine Forest Park revocation land and proposed Smedley Exchange Block in relation to Ruataniwha Water Storage Scheme" (27 May 2015).

(f) **Accept** my recommendation that you revoke the conservation park status of the RFP land (if you wish to progress the exchange proposal) subject to declaring the land as aforesaid.

[41] On 25 September 2015 the Director, Planning, Permissions and Land, Marie Long, put a "Departmental Submission" to the Director-General who had visited the site the previous month. It was endorsed by the Deputy Director-General Operations, Mike Slater, and was prepared with input from DoC's Legal Services and the Crown Law Office. It contained 19 recommendations, including: [23]

(d) **Note** that you may not authorise the exchange of the RFP land for the Smedley land unless you are satisfied that the exchange would enhance the conservation values of land held by the Department and promote the purposes of the Act;

...

(f) **Note** that subsequent to the hearing of the revocation proposal, the Department has carried out a comprehensive comparative analysis of the conservation values present in the RFP land and the Smedley land which analysis confirms that the exchange of the RFP land for the Smedley land will enhance the conservation values of land held by the Department and promote the purposes of the Act;

…

(k) **Agree** that the proposed exchange would enhance the conservation values of land managed by the Department and promote the purposes of the Act;

[42] The Submission then recommended that the Director-General:[24]

(a) agree to declare the Forest Park land to be held for conservation purposes;

(b) agree to revoke the purpose of the Forest Park land as a conservation park "on the basis that you wish to progress the proposed exchange of the RFP land for the Smedley land";

(c) authorise the proposed land exchange under s 16A "on the basis that you are satisfied that the proposed exchange meets the test under

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[23] Departmental Submission to Director-General of Conservation (25 September 2015), at 7.
[24] At 8.

s 16A and it is desirable that the Smedley land be acquired by exchange";

(d) agree to hold the Smedley land for the purpose of a conservation park.

[43] The Submission also noted that the Company was receptive to including an additional 30 hectares of land with the original 147 hectares of Smedley land to be exchanged and had offered to assist management of the future habitat of whio and with wilding pine eradication over the Smedley land. The submission recommended these as additional requirements, as well as fencing conditions.[25]

[44] The Director-General, Lou Sanson, agreed to the recommendations of the Hearing Convenor and the Director, Planning, Permissions and Land on 5 October 2015, correcting the references to the additional land from 30 hectares to 23.4 hectares. He qualified his agreement to the revocation by noting in handwriting the words "subject to HBRIC taking title to the Smedley land and the additional 23.4 ha". The additional area is shown on the map reproduced below.[26]

[45] In his letter of 5 October 2015 to the Company, communicating his decision, the Director-General reiterated that he was satisfied that the proposed exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act.[27] In his evidence to this Court, the Director-General further states:[28]

> I assessed the scientific information, including the additional information values on a before and after the dam scenario. I considered the information, which covered not only the RFP land but also the Smedley land to be thorough, reliable and objective and the peer reviews of it assisted in this. There was no doubt in my mind that what was being proposed would enhance the conservation values of land managed by the Department and promote the purposes of the Act. Based on the present values of the RFP land and the Smedley block, I was satisfied that the exchange would enhance the conservation values of the Ruahine Forest park as a whole and the broader conservation estate.

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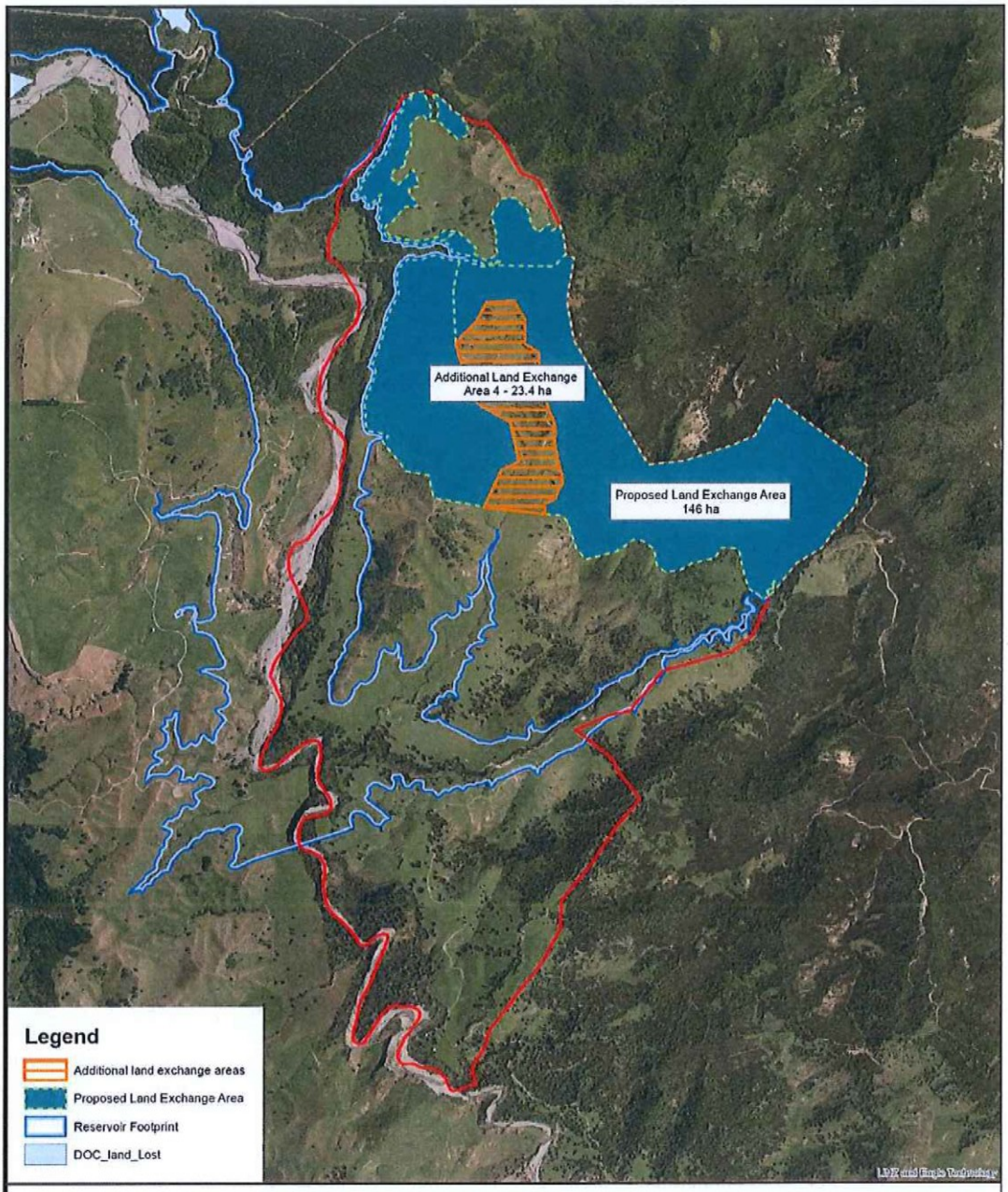
25 Above n 23, at 8 – 9. See recommendations (i) and (q).

26 Kessels Ecology "Ruataniwha Dam - DoC Land Exchange" (map produced 1 October 2015).

27 Letter from Lou Sanson (Director-General of Conservation) to Andrew Newman (Chief Executive Officer, HBRIC Ltd) regarding the proposed land exchange under the Conservation Act 1987 (5 October 2015), at [11].

28 Affidavit of Lou Sanson dated 27 November 2015, at [31].



Ruataniwha Dam - DOC Land Exchange

Created By: Wisa van der Zwan
Date: 1/10/2015
Project: Ruataniwha Dam
PWF: HDR 60923
Client: Hawkes Bay Regional Council
File: I:\GIS\data\Ruataniwha_Plains\Ruataniwha_DOC_Exchange_work_2014_Update.mxd

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Aerial Photography: Sourced from LINZ under CC3
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Forest & Bird's Challenges

[46] Forest & Bird does not challenge the Director-General's decision to declare the Forest Park land to be held for conservation purposes under 7(1). Forest & Bird challenges the Director-General's decision to revoke the status of the Forest Park land on two grounds:

(a) Satisfying the land exchange test in s 16A for stewardship land is not a proper purpose, and is an irrelevant consideration, for the decision to revoke the status of specially protected land.

(b) The revocation decision was not in accordance with, and the Director-General did not have regard to, policies in the Conservation General Policy and Hawke's Bay Conservation Management Strategy.

[47] Forest & Bird also challenges the exchange decision on the basis that the Director-General was required to, and did not, address the reservation of marginal strips when deciding to exchange the land.

Challenge to revocation decision on basis of exchange

Submissions

[48] The first, and most central, challenge is that satisfying the test for exchanging stewardship land in s 16A is not a proper purpose, and is an irrelevant consideration, for the decision to revoke the status of specially protected land. Mr Hikaka for Forest & Bird submits that the Director-General's decision collapses the Act's distinction between stewardship and specially protected areas and conflates the two separate statutory processes of revoking specially protected land status and exchanging stewardship land. Mr Hikaka submits that the Act requires that the revocation decision can only be made if the intrinsic values of the resources in the land no longer deserve the protection accorded them by their status.[29] This requires a focus on the conservation values of the land having its status revoked, rather than a relative assessment with the value of other land. He maintains this position on

[29] Submissions for the Applicant, at [112].

behalf of Forest & Bird even if the proposed exchange would increase the overall conservation value of the land held by DoC or would mean a better conservation outcome is achievable.

[49] The Crown, on the other hand, submits that the purpose of the Act is to promote conservation of all natural resources and the Director-General must take a global view of the conservation implications of the revocation decision rather than focussing on one particular resource in isolation. Mr Prebble for the Crown submits that means the law does not prohibit revocation of specially protected conservation status for the purpose of a land exchange. Here, Mr Prebble says that the wider public recreation and enjoyment of the Ruahine Forest Park is enhanced by the revocation and exchange. Mr Prebble acknowledges that the Crown's analysis of the conservation value of the Forest Park land rested on its relative value in comparison with the Smedley land, rather than constituting an assessment of the conservation value of the Forest Park land divorced from the Smedley land.

Text and Purpose

[50] The parties' submissions on this point rest on statutory interpretation, as does much of the law of judicial review in practice. The rule of law and section 5(1) of the Interpretation Act 1999 require that the primary basis for that is the text of the Act even if that must also be cross-checked against purpose.

[51] Here, the text of s 16 is clear that no conservation area – which includes both stewardship areas and specially protected areas – shall be disposed of except in accordance with the Act. Sections 16A and 26 provide mechanisms for disposing of stewardship land, by way of exchange and more generally. There is no statutory mechanism provided to exchange or otherwise dispose of specially protected areas. So the status of the relevant land is key to whether it may be exchanged.

[52] Declaring the Forest Park land to be held for the purposes of a conservation park involves the Director-General, as the Minister's delegate, conferring upon it "additional specific protection" (according to the heading of s 18) and making it a "Specially protected area" (according to the section header of Part 4). There is no explicit statutory test to meet in so doing under s 18(1). Similarly there is no explicit

statutory test which has to be met in revoking the purpose of a conservation park for which land is held under s 18(7).

[53] However there is no dispute that the orthodox principle of administrative law applies: a power may not be exercised for a purpose that is not within the contemplation of the enabling statute.[30]

[54] As the Supreme Court stated in *Unison Networks Ltd:*[31]

> A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".[32] A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.[33]

[55] The Court went on to say:[34]

> Often, as in this case, a public body, with expertise in the subject matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy consideration will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

[56] Applied to conservation (rather than economic) objectives here, this requires me to identify whether taking into account the proposed land exchange can or cannot be rationally regarded as coming within the statutory purpose of revoking the specially protected status of a conservation park.

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30 *Astrazeneca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29].
31 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].
32 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 per Lord Reid.
33 *Attorney-General v Ireland* [2002] 2 NZLR 220 at [42] and [43] (CA); *Poananga v State Services Commission* [1985] 2 NZLR 385 at 393-394 (CA).
34 Above n 31 at [55].

[57] The High Court's reasoning in *Buller Electricity Ltd v Attorney-General* is related to the question here, but was addressing a different question. Doogue J there considered that, examining the Act as a whole:[35]

> …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.

This is supported by the title of the Act, the definitions, the functions of DoC that are tied by s 6 to managing land "for conservation purposes", and the holding of land under ss 7 and 18 "for conservation purposes". But, as the parties here agreed, that does not help elucidate whether "conservation purposes" and "a good and proper basis" should relate to a particular natural resource or a more global concept.

[58] Forest & Bird submits that particular aspects of the wording of the Act indicate that the conservation values of a particular natural resource should be assessed on its own merits and without reference to other resources:

(a) The definition of conservation refers to "preservation and protection of natural and historic resources for the purpose of maintaining *their intrinsic values"*. The italicised words suggest Parliament considered that each resource has an intrinsic value.

(b) The same point arises in the definition of "preservation" which refers, "in relation to a natural resource" to "its intrinsic values".

(c) The phrase "enhance the conservation values of land managed by the Department" occurs only twice in the Act, in relation to the disposal of stewardship land (ss 16A and 26).

[59] I consider that Forest & Bird is correct in emphasising the importance under the Act, including in those three definitions, of intrinsic values of natural and historic resources. Parliament clearly intended that these resources be regarded as important in and of themselves, rather than for merely instrumental purposes. I agree, as both

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[35] *Buller Electricity Ltd v Attorney-General*, above n 5, at 352.

parties submitted, that the conservation purposes of the Act must guide a decision to revoke that status of specially protected land. But I do not agree with Forest & Bird that the definitions in the Act, in referring in the singular to "a resource", were intended to require a narrow interpretation of the meaning of "conservation" or of "conservation purposes". And I do not agree that consideration of the conservation purposes of the Act that guide a revocation decision in respect of particular land must be limited to only that land.

[60] The purpose of the Conservation Act is broadly expressed but is tied very directly to "conservation" by both its short and long titles. As Heron J noted *Spectrum Ltd v Minister of Conservation*:[36]

> There can be no doubt, as Mr Salmon says, that the Conservation Act 1987 has, by its own terms, an uncompromising emphasis which, as its long title confirms, is to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation.

[61] The reference to the promotion of conservation of "New Zealand's natural and historic resources" in the long title is to a broad and collective concept. The meaning of the definition of "conservation" and the meaning of "conservation purposes" in the Act must be interpreted broadly, as must the purpose of the Act. There is nothing in the text of the statute that requires the intrinsic value of a single resource to be preserved or protected if that diminishes conservation purposes in New Zealand more broadly conceived.

Legislative History

[62] Legislative history can provide clues to statutory purpose and the history of s 16A, inserted by amendment in 1990, is relevant here.

[63] The Act as passed in 1987 made no provision for exchange of land. During the passage of the original Act in 1987 the Minister of Conservation noted the provisions empowering disposal of stewardship land and opposition members

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[36] *Spectrum Resources Ltd v Minister of Conservation* [1989] 3 NZLR 351 (HC) at 363.

criticised the lack of public notification requirements.[37] The Minister also explicitly stated:[38]

> New Zealand's protected areas are not up for barter. They are a treasure, a taonga that must be handed unspoilt from one generation to another. They are irreplaceable and do not have a price.

[64] Clause 11 of the Conservation Law Reform Bill in 1989 proposed a new s 16A which made provision for disposal of conservation areas by exchange, without being limited to any particular category of land. As originally introduced, it would have allowed exchange of specially protected land including conservation parks. Various submissions to the Planning and Development select committee, including by Forest & Bird, opposed the application of the power to more than stewardship land and opposed the lack of public notification. Even the Maruia Society, which promoted the ability to exchange stewardship land where there was a net conservation benefit, opposed the exchange mechanism applying beyond stewardship land. DoC officials advised the Select Committee against changing the clause and it proposed no change. However, an amendment was subsequently made to the Bill by the Committee of the Whole House adopting the government's Supplementary Order Paper No 20 of 27 March 1990. That limited the power to exchange land to stewardship land only, though it did not require a public notification and submission process.

[65] Mr Hikaka, for Forest & Bird, submits that the clear and unambiguous intention of Parliament to limit the exchange mechanism to stewardship areas, only, means that enabling a land exchange under s 16A goes beyond the proper purpose of the power to revoke conservation park status.

[66] By contrast Mr Prebble, for the Crown, acknowledges that the amendment could indicate Parliament's intention not to permit exchanges of specially protected land or, equally, could indicate an intention to ensure that exchanges to conservation areas other than stewardship areas cannot occur without first requiring a public process (via the revocation of status). Mr Prebble submits that a change made to

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37 (11 December 1986) 476 NZPD 6142 (Simon Upton MP); (11 December 1986) 476 NZPD 6139 (Hon Russell Marshall, Minister of Conservation).

38 (11 December 1986) 476 NZPD 6149 (Hon Russell Marshall, Minister of Conservation).

s 16, at the same time as insertion of s 16A, supports the latter view as it removed the distinction between protected and stewardship land in relation to disposal.

[67] I consider that the Crown's alternative explanation for the reason for the amendment to s 16A during its passage is unlikely. On its face, the explicit decision to restrict the availability of the exchange mechanism to stewardship land, when it had initially been unrestricted, strongly suggests that the exchange mechanism was not intended by Parliament to apply to specially protected conservation areas. Neither do I consider the amendment to s 16 is of assistance; it appears to me to be a simple drafting response to the availability of more than one means of disposal of conservation areas.

Conclusions on the Law

[68] It follows from my analysis of the text and legislative history that I agree with Forest & Bird that there are two distinct decisions required where a specially protected conservation area such as a conservation park is proposed to be exchanged for other land. That is reinforced by the scheme and purpose of the legislation. First, the decision-maker must decide whether to revoke the specially protected purpose of the conservation area. Only if the outcome of that decision is revocation may the decision-maker then decide whether to undertake the land exchange. To view the process as a single step would be to obviate the clear Parliamentary intent not to provide a mechanism allowing specially protected land to be the subject of exchange.

[69] However, Forest & Bird goes further and submits that satisfying the land exchange test in s 16A for stewardship land is not a proper purpose, and is an irrelevant consideration, for the decision to revoke the status of specially protected land.

[70] I do not agree that a proposed land exchange is an irrelevant consideration when considering whether to revoke the specially protected status of land. Each decision being legally distinct does not require the decision-maker to blind themselves to a proposed land exchange in making the revocation decision. It would be artificial and inimical to good public administration for public objections and

submissions on a revocation, and the revocation decision itself, to be prevented by law from taking into account the merits of the proposed land exchange. Rather, I consider that doing so may well constitute failing to take into account a relevant consideration which would be contrary to the law of judicial review.

[71] What matters more is the basis on which a revocation decision is made. The promotion of the purposes of the Act is the guiding light for both the revocation decision and the exchange decision. In addition, the exchange decision requires, explicitly in s 16(2), the decision-maker's satisfaction that the exchange will enhance the conservation values of land managed by DoC. Enhancing the conservation values of land managed by DoC is not the test for the revocation decision, which involves a broader conception of conservation purposes than only reference to what happens on land managed by DoC. In making the revocation decision, the decision-maker must satisfy himself or herself that there is a good and proper basis, founded in conservation purposes, for the revocation. And, as I find above, a broad interpretation of conservation purposes is required.

[72] Forest & Bird's submission involves taking a narrow interpretation of the purposes of the Conservation Act to guide the revocation decision. Indeed Forest & Bird acknowledged at the hearing that its submission against taking the proposed exchange into account applies irrespective of whether total conservation value is increased or a better conservation outcome is achievable. Thankfully, Forest & Bird does not ask me to review the substance of the expert judgment by the Director-General and his staff on the relative conservation values of the Forest Park land and the Smedley land. (If it had, I would have been inclined to agree with the submission of Mr Williams for the Company that there is no "bright line" test on such an issue.)

[73] I consider Forest & Bird's submission puts too narrow a construction on the purpose of the Act which must guide the revocation decision. As I find above, the promotion of conservation purposes, broadly interpreted, is at the heart of the Conservation Act. To rearrange the words of the Supreme Court in *Unison Networks,* the Director-General of Conservation revoking specially protected status

of conservation land guided by a broad interpretation of conservation purposes *must* "rationally be regarded as coming within the statutory purpose".[39]

Application to the Director-General's Decision

[74] Here, DoC did not pretend to be considering revocation independently of the exchange. It was consistently focused on the proposed exchange and characterised revocation as one of the steps required to effect the exchange. For example, the decision-paper before the Director-General on revocation and exchange was said on its first page to relate to a proposal "that an area of private land be exchanged for land held as part of the Ruahine Forest Park".[40] As noted above, its advice to the Minister of 21 November 2014 was explicit in characterising that as "conditional on the revocation which would only be proposed in this circumstance to enable the exchange".

[75] The focus of the decision paper on the proposed exchange came perilously close to risking the wrong legal test being applied to the revocation decision. For example, notes by DoC staff (understood by the Director-General to summarise their "key reasons" for favouring the exchange) which refer in their heading to "Revocation and Exchange", refer only to their conclusion that the exchange "would enhance the conservation values of land managed by the Department".[41] The statutory test in s 16A for the exchange was the only test identified in the decision paper. That test was that the exchange "would enhance the conservation values of land managed by the Department, and would promote the purposes of the Act."[42] The same phrase was formulaically recited in the decision paper and its recommendations. It was even used specifically in relation to the revocation decision standing alone as well as in the summary of the section headed "Section 49 Process".[43]

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39 Above n 31.
40 Above n 23 at 1.
41 "Notes for Lou on Ruahine Forest Park Land Revocation and Exchange" (annexed to the affidavit of Lou Sanson dated 27 November 2105).
42 See, for example, above n 23 at [1.8].
43 Above n 23 at recommendation (g) and [5.28].

[76] It is understandable that this could give rise to concerns that DoC was effectively ignoring the statutory prohibition on exchange of specially protected land and, as expressed by Forest & Bird, was treating the conservation estate as a fungible business portfolio and trading conservation land, as long as it was always increasing total conservation value. But was the revocation decision unlawful?

[77] The decision-papers for the relevant decision by the Minister, the Deputy Director-General and the Director-General were clear that there were two distinct decisions to be made on revocation and exchange. The decisions were to be made, and were made, in sequence albeit as part of the same process.

[78] The basis on which the decision was made is harder to establish. As noted above, the Director-General's evidence is that "[t]here was no doubt in my mind that what was being proposed would enhance the conservation values of land managed by the Department and promote the purposes of the Act".[44] He was "satisfied that the exchange would enhance the conservation values of the Ruahine Forest park as a whole and the broader conservation estate". Conceivably, those two statements could be taken to refer only to the narrower test for s 16A.

[79] However, the Director-General's evidence also directly addressed the objection raised by Forest & Bird in submissions that is the subject of this challenge. To that, the Director-General says "[i]n response to the above approach, I took the view that the powers in the Act existed and focussed on whether the purpose of the Act was being advanced".[45] I am not satisfied, on the evidence, that the Director-General took too narrow a view of the revocation decision by applying to it the test for exchange. He relied on his staff's broader assessment of the conservation values of the Smedley block, including future values, rather than the current values urged on DoC by the Company.[46] And in his evidence he goes beyond the s 16A test and the land managed by DoC to say "[t]hat said, I am convinced that what was offered to and accepted by me well and truly meets the purpose of the Conservation Act and is a good outcome for the Department and conservation".[47]

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44 Above n 28 at [31].
45 Above n 28 at [23].
46 Above n 28 at [32]; see also above n 23, at [5.11] to [5.16].
47 Above n 28 at [34].

[80] I consider, on the evidence before me, that the Director-General did satisfy himself that there was a good and proper basis, founded in conservation purposes broadly interpreted, for the revocation decision. That is what he was required to do.

Challenge for Relevance of the Two Policies

[81] Forest & Bird's second ground of challenge is that the revocation decision was not in accordance with, and the Director-General did not have regard to:

(a) Policy 6(b) of the Conservation General Policy which provides that "the classification of any public conservation lands may be reviewed from time to time to ensure that the classification of such lands continues to" achieve six specified objectives.

(b) Chapter 3.7 of the Hawke's Bay Conservation Management Strategy (CMS), which provides at 3.7.ii that:

> 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 land which have low natural or historic value.

[82] Forest & Bird points to s 17A of the Act which requires all conservation areas to be administered and managed in accordance with statements of general policy and conservation management plans.

[83] The problem with this argument is that the particular policies that Forest & Bird point to are not policies which govern the decision under challenge. The decision under challenge is to revoke the specially protected status of the Forest Park land under s 18(7) of the Act. Policy 6(b) of the Conservation General Policy provides DoC with a discretion to conduct a general review, from time to time, of the classification of public conservation lands and of the status of areas under DoC's management. Section 3.7 of the Hawke's Bay CMS, entitled "Land Administration", relates to the need for DoC to conduct a review of the status of land "as the existing status may not necessarily reflect their natural values". The objective is stated to be

"[t]o achieve the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department".

[84] The nature and purpose of the general review exercises which are guided by these policies are quite different from the specific decision about the proposed revocation of the existing status of the Forest Park land here. As the Crown submits, policy 6(a) of the Conservation General Policy applies, and links the consideration of land exchange back to conservation purposes as required by the Act as explained above. However I do not agree with the Crown submission that this decision can be properly characterised as a "boundary adjustment" to the Ruahine Forest Park.

[85] I consider the two policies invoked do not apply to the revocation decision and failure to make a decision in accordance with them, or to take them into account, does not render the decision unlawful. Even if they did apply, they would not require a substantive decision that takes a narrow view of the purposes of the Act.

Challenge for Failure to Reserve Marginal Strips

[86] Forest & Bird's third challenge is that the Director-General was required to, and did not, address the reservation of marginal strips when making the decision to exchange the land. Section 24(1)(c) of the Act requires that a 20 metre strip of land be reserved along the bed of any river or stream with an average width of 3 metres or more. Ms Gepp for Forest & Bird submits that marginal strips are required here because, within the Forest Park land, there are rivers or streams with such beds as identified in the evidence of Dr Keith Lloyd, a Senior Ecologist.

[87] The decision document from Ms Long to the Director-General of 25 September 2015 commented that "[i]n the circumstances it is unlikely that any marginal strips will be acquired".[48] Ms Long's evidence is that this was because her experience is that there are many complicating factors with marginal strips including, in relation to land that is inundated, whether the marginal strip would itself be inundated. Her evidence also notes, as did the submission, that formal survey of the boundaries of the Forest Park land would be required before the gazettal of the s7(1)

[48] Above n 23 at [6.6].

decision would occur. The Director-General's evidence is that his view was that "until survey is undertaken of the respective pieces of land, it is not possible to determine whether marginal strips are in fact a live issue".[49]

[88] Mr Prebble for the Crown and Mr Williams for the Company submit that what is proposed would not constitute a "sale or other disposition" of land under s 24. Alternatively, if it would, they submit that reservation of marginal strips is not required yet because a future decision can and will still be made on this point if necessary.

[89] I agree with Forest & Bird that what is currently proposed would constitute a disposition of land under s 24 of the Act. The Crown's and Company's argument that the exchange is not a sale or disposition is simply not tenable, based on text or purpose, especially given the wide definition of "sale" in s 2 of the Act and the breadth of the additional clarification provided by subs 24(6) to (9).

[90] However, the sale or disposition has not occurred yet. As Forest & Bird acknowledged at the hearing, there is currently only a "proposed disposition".

[91] Whether that means that marginal strips would need to be reserved from the disposition here depends on facts that are as yet unknown and events that have yet to occur including: any survey of the boundaries of any rivers; the consideration by the District Land Registrar of his or her responsibilities under s 24D; the sequence and timing of inundation compared with disposition; and the possible invocation of exemption from marginal strips by the Minister under s 24B.

[92] I cannot determine the application of law to hypothetical facts. Because the disposition has not (yet) occurred, I cannot rule on the lawfulness of the reservation of marginal strips. Doing so would relate to a new set of facts than those that are before me. Accordingly, I do not propose to take up Ms Gepp's request that I grant leave to Forest & Bird to seek further directions from the Court on this point.

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[49] Above n 28, at [26].

Result

[93] Although I have agreed with some of Forest & Bird's submissions on the law, I have declined to uphold Forest & Bird's challenges to the Director-General's decision to revoke the conservation park status of the Forest Park land. While I have agreed with Forest & Bird that what is proposed may create an obligation to reserve marginal strips from the sale or disposition of the Forest Park land, such disposition has not yet occurred so a challenge to that is premature.

[94] I would be reluctant to order costs against Forest & Bird here. They have competently and responsibly advanced legitimate arguments in the public interest. If, despite this indication, the Crown or the Company wish to pursue costs then they should file a memorandum within 20 working days of delivery of this judgment after which Forest & Bird would have 20 working days to file a memorandum in response.

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Palmer J