THE STEWARD AND THE STEWARDSHIP

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Abstract

In environmental literature the word stewardship suggests serious responsibilities to the environment entrusted to the steward's care. In New Zealand, however, stewardship land enjoys less permanent protection than any other category of land administered by the Department of Conservation. The Department's recent attempt to revoke a higher protection status and thereby return land to stewardship status revealed a lack of clarity as to the Conservation Act's high policy. After litigation, the Department's powers are somewhat clearer and more limited. The Department's credibility as a conservation advocate has, however, suffered. The Conservation Act has not prevented various Departmental failures of good stewardship, and other law changes suggest that, unless serious changes are made, the Department may well continue to fail to live up to conservationists' expectations.

> And the lord commended the unjust steward, because he had done wisely: for the children of this world are in their generation wiser than the children of light.
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> – Luke 16:8[1]

I. Stewardship Land

On behalf of the New Zealand people, and for the purposes outlined in the Conservation Act 1987,[2] the Department of Conservation administers

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1 *The Holy Bible* (King James Version) at Luke 16:8.

2 In particular s 6(a) of the Conservation Act 1987: "to manage for conservation purposes all land … held for the time being under this Act". "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" (s 2).

some 8,600,000 hectares, roughly one third of New Zealand's total land area of about 26,800,000 hectares.[3]

Of these 8,600,000 hectares, about 2,820,670 hectares – almost a third and, therefore, roughly a ninth of New Zealand's total land area – is "stewardship land".

Stewardship land is not the highest category of land held by the Department, but actually the lowest. It is merely land administered by the Department (and therefore a "conservation area", as is all "land or foreshore held under this Act for conservation purposes")[4] which has received no higher classification and, therefore, protection.[5]

As explained below, the particular label "stewardship land" arose out of the practical political situation at the time the Department of Conservation was established. The Act describes a very prosaic form of stewardship, just as the dictionaries define "stewardship" in a prosaic manner[6]. Nevertheless, it is, at the least, worthy of remark that this lowest category of conservation land bears such a promising name, for stewardship is sometimes spoken of as involving lofty and important duties. Environmental rhetoric sometimes speaks of humankind's responsibilities to care for the earth as a stewardship. Section 7 of the Resource Management Act 1991 includes the "ethic of stewardship" and "kaitiakitanga" among the matters to which all persons exercising functions and powers under the Act shall have particular regard.[7]

Parliament could easily have used another term for this least-protected category of conservation land. It could have spoken of interim or provisional protection, of a land bank, or of Category A and Category B lands. The word stewardship, although familiar to English speakers, has a slightly old-fashioned air to it. It cannot have been an accident that Parliament chose this word. It is easy to imagine that Parliament chose it specifically for its overtones of environmental responsibility - overtones which, intentionally or not, might actually divert attention from that land's more precarious conservation status.

3 The figure of 8,600,000 appears in the Department's Annual Report for the year ending 30 June 2015 <doc.govt.nz>. However, the Parliamentary Commissioner for the Environment, in her August 2013 report on stewardship land, discussed below, gives a total area of 8,838,470 hectares. Jan Wright *Investigating the Future of Conservation: The Case of Stewardship Land* (Parliamentary Commissioner for the Environment, 21 August 2013).

4 Section 2 of the Conservation Act 1987.

5 At s 2, "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 s 18 (1) …".

6 "Steward: An official appointed to control the domestic affairs of a household, esp. the supervision of servants and the regulation of household expenditure" *Shorter Oxford English Dictionary* (3rd Revised Edition, Oxford University Press, Oxford, 1993).

7 Resource Management Act 1991 s 2 defines kaitiakitanga as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori … and [which] includes the ethic of stewardship".

II. The Philosophies of Stewardship and Sustainability

The well-known adage, "We have not inherited the earth from our parents, but have borrowed it from our children", is but an environmental re-phrasing of Edmund Burke's insistence that we are but the "temporary possessors and life-renters, not the entire masters", of what we have received from our ancestors. We hold our inheritance in "moral entail" with a duty to pass it on in an enhanced state, if possible, but at the least unimpaired.[8]

Yet the philosophy of stewardship is not nearly as prominent as that of sustainability. An unscientific examination of the indexes of standard environmental texts reveals countless references to sustainability as a guiding principle, but very few to stewardship.[9] A statutory preference for sustainability does little to explain this phenomenon. It merely places the question one further step back: *why* do statutes refer to sustainability and not stewardship?

The reason cannot lie in the precision or helpfulness of the concept of sustainability. Since *New Zealand Rail v Marlborough District Council,*[10] it has become increasingly clear that the Resource Management Act's definition of sustainable management is not much more helpful than if the legislature had suggested, in Ian Williams' words,[11] that sustainable management meant "sugar and spice and all things nice". A definition that simply lists all good things says little about sustainability, and even less about management.

Without more ado, "sustainability" leaves unstated the thing that is being sustained. It is impossible to sustain an ecosystem, a particular resource and a human community all at the same time. Ecological sustainability and human use may well be incompatible. To manage land for one human use reduces the capability of that land to serve other human uses. And in the end, human needs will always take precedence.

Donald Worster considers the acceptance of sustainability as marking the point at which the environmental movement abandoned its hopes of fundamentally changing the world.[12] Instead, it compromised with a fatally

8 Edward Burke "Reflections on the Revolution in France" (J Dodsley, London, 1790) at ch xiv. William J Ophuls in *Ecology and the Politics of Scarcity Revisited* (W H Freeman & Co, New York, 1992) presents substantial arguments for Burke's stewardship philosophy as the best for our forthcoming new age of scarcity.

9 Works which do *not* mention stewardship include Gru Brundtland *Our Common Future* (*the 'Brundtland Report'*) (UNESCO, Bonn, 1987); Eric T Freyfogle *Why Conservation Is Failing and How It Can Regain Ground* (Yale University Press, New Haven CT, 2006); Donella Meadows *Limits to Growth: a report for the Club of Rome's Project on the Predicament of Mankind* (Universe Books, 1972); Tim Jackson *Prosperity Without Growth, Economics for a Finite Planet* (Routledge, London, 2009) and KS Shrader-Frechette *Environmental Ethics* (Rowman & Littlefield, Lanham, 1998).

10 *New Zealand Rail v Marlborough District Council* [1993] 2 NZRMA 454.

11 Ian Williams "The Resource Management Act 1991: Well Meant but Hardly Done" [2000] 9 Otago LR 673.

12 Donald Worster "The Shaky Ground of Sustainable Development" in *The Wealth of Nature, Environmental History and the Ecological Imagination* (Oxford University Press, Oxford, 1994).

flawed model of human relationships with the earth. "Sustainability" expressed the hope that current lifestyles needed only to be modified, not fundamentally altered; that we could, essentially, have our environmental cake and eat it too. The basic conservation truth, Eric Freyfogle asserts, is that:[13]

> … our behaviour to nature is somehow deficient … [W]e need to act more humbly and respectfully … [This is] easily forgotten when humans are assigned the task of 'sustaining' nature.

The vagueness of "sustainability" – especially when "sustainable" is linked with any number of nouns – management, development, institutions, cities, societies, transport, agriculture, anything – has rendered the concept meaningless.[14] It thereby becomes much more acceptable as an agreed principle. It allows human beings to be in charge of managing the earth, and making decisions which may be harmful to Nature as long as they can be argued to serve the greater purpose of sustainability. But if our fundamental environmental problem is that we are not humble and respectful enough to nature, then surely stewardship offers greater potential to be a remedy.

Stewardship and sustainability both look to the future, but from different perspectives. A steward must be more humble than a sustainer, because even though a steward may command the household under his care, he still does so only as the servant of the master. A steward is also more limited in his range of options, because his duty is to maintain what already exists. He is not free to sacrifice some of his inheritance for experiments in sustainability.

It may be no accident, then, that many of those seriously proposing stewardship as an ecologically necessary and philosophically acceptable model for the future have worldviews enriched by spiritual understanding. John Seymour[15] thought "Benedictine stewardship" the highest recommendation and cultural artefact of the Roman Catholic Church. Matthew Fox was a Dominican monk,[16] and Sean McDonagh,[17] a Columban priest. Wendell Berry admires the Mennonite Amish communities and,[18] like Rene Dubos[19] and John Peet,[20] speaks from a broad Christian conviction.

Some still do not find enough humbleness in this "shallow ecology". Michael Pollan offers the "idea of the garden" as a mutually fruitful model

13 Eric Freyfogle, above n 9, at 119.
14 Westpac's advertising describes itself as "the world's most sustainable bank".
15 John Seymour *The Ultimate Heresy* (Green Books, Cambridge, 1989).
16 Matthew Fox *Original Blessing* (Bear & Co, Santa Fe, 1983).
17 Sean McDonagh *To Care for the Earth* (Bear & Co, Santa Fe, 1987).
18 Wendell Berry *The Gift of Good Land* (North Point Press, New York, 1981); Wendell Berry *The Unsettling of America* (Sierra Club Books, San Francisco, 1986).
19 René Dubos "Franciscan Conservation versus Benedictine Stewardship" in David Spring and Eileen Spring (eds) *Ecology and Religion in History* (Harper Torchbooks, New York, 1974).
20 John Peet *Energy and the Ecological Economics of Sustainability* (Island Press, Washington DC, 1992).

for human relationships with the earth;[21] Eric Freyfogle considers that model "merely a kinder, gentler form of land degradation".[22] No adherent of "deep ecology", which recognises the inherent value of nature, would even accept that the human species has any more natural rights than any other. Human beings have duties to respect other species, not powers of management over them.[23]

Aldo Leopold, in his immortal *A Sand County Almanac*,[24] proposed a "land ethic" whereby humans would cease to be lords of creation and would instead regard themselves as members of the "land community". He has therefore been claimed as one of the founders of Deep Ecology. His hope, though, that "[w]hen we see land as a community to which we belong, we may begin to use it with love and respect" is also compatible with the position of human stewardship.

Love for the land can express itself in different ways. Rather than arid debates about correct positions, it may be enough to echo St Augustine and say, "Love, and do what you like".

That instruction, though, is not specific enough for a Government Department. Perhaps remarkably, the Conservation Act offers little coherent philosophy of the Department's duties concerning its own lands. The Act's definition of conservation speaks in the same breath of intrinsic value, public recreational enjoyment and future human generations. The general duty does seem to be that of a caretaker – a steward – rather than a developer, but the Act's guidance as to Departmental decision-making has been interpreted by the Department, at least, as allowing some surprising latitude. *Quis custodiet ipsos custodes*?[25] A firm Departmental commitment to genuine stewardship would be welcomed by many.

III. The Inappropriateness of 'Stewardship Land' Classification

The lowly legal status of stewardship land in the Conservation Act should not lead us to believe that the land so classified – or, more accurately, the land *not otherwise* classified – is necessarily of lesser conservation value than other parts of the public conservation estate. Especially in the South Island, many areas of stewardship land have very high conservation values. Some areas undoubtedly worthy of national park status still have this low classification. The areas were largely identified by the then Parliamentary Commissioner for the Environment, Dr Jan Wright, in her August 2013 report, *Investigating*

21 Michael Pollan "The Idea of the Garden" in *Second Nature* (Bloomsbury, London, 1996).
22 Freyfogle, above n 9, at ch 3 "The Lure of the Garden".
23 Devall and Sessions, *Deep Ecology, Living As if Nature Mattered* (Gibbs Smith, East Layton, 1985).
24 Aldo Leopold *A Sand County Almanac* (Oxford University Press, Oxford, 1949)
25 "Who shall guard the guardians themselves?" (Juvenal, Satire VI, lines 347–348).

the future of conservation: The case of stewardship land. The largest and finest stewardship land areas in the South Island include Dean Forest and the Longwood Range,[26] the Livingstone Range and Mavora lakes, the catchments of the Haast and Landsborough and all the wonderful lowland forest between the Cascade and Big Bay; the catchments of the Hokitika and much of the Grey; the Denniston Plateau and Mokihinui River, the Raglan Range, the former St James Station and the headwaters of the (Canterbury) Waiau River.

Explanations as to why lands of such high conservation value lack the legal status properly reflecting those values must presumably centre round the glacial pace – to employ no harsher term – at which the Department's bureaucracy moves. Once one might have fairly added that the Department, when it was established in 1987, faced large challenges in classifying the lands it found itself in charge of, but after 30 years that excuse is surely no longer available.

The reasons for the existence of the *category* of stewardship land lie in the history of the Department's establishment, and in the previous status of the lands allocated to this new department of state.

Nearly all of what is now the public conservation estate had before 1987 been held and administered by two government departments. One was the New Zealand Forest Service, which, despite its perhaps misleading name (imitating the United States of America's federal Forest Service), was a proper Department of State, regulated by the Forests Act 1949. The other, the Department of Lands and Survey, had an even longer history, with occasional variations of name, and was finally regulated by the Land Act 1948.

Both departments had mixed functions. The Department of Lands and Survey administered national parks and reserves, but also held much other Crown land and was responsible, *inter alia*, for the breaking-in of new land and the establishment of farm settlements. These farms would eventually be freeholded to new farmers. The Forest Service, which held most of the Crown's native forests, had identified "protection forests" on steeper country, and "forest parks" (where native logging could still be carried on in delineated areas), and still allowed logging access to various other lowland forests, on very generous terms, to logging interests in some rural communities. Virtually all its commercial income arose from the vast planted exotic forests still then (before the State-Owned Enterprises Act 1986 and later privatisations) publicly owned, but the Service still harboured ambitions of discovering the secrets of long-term sustainable indigenous forest management. These ambitions made it the enemy and target of the vigorous conservation movement of the 1970s and 80s.

There were economic reasons, though, as well as conservation ones, why the reforming Labour Government of 1984 to 1990 handed the kingdoms of the Forest Service and the Lands and Survey Department over to the Medes and Persians. But in any case, much of the land held by the old departments

26 Shown in Figure 3.3 of the Report, Wright, above n 3, at 28 and 29.

was in no sense allocated to conservation purposes. It might well have been that in future some form of human use and development would be found for it. Stewardship land was therefore intended – initially, at any rate – to be a neutral land bank, to hold land whose ultimate end use had not been decided upon.[27] There was, to begin with, no automatic assumption that stewardship land merited protection. After all, if it did, why had it not already been classified as national park, reserve or forest park? On the other hand, given that all remaining wild lands are ones for which little or no human use has been found in the long period of European settlement, and that wilderness is, in the current dispensation of human affairs, a resource which can only shrink, and not grow, it could be argued that practically all such remaining areas *ipso facto* have conservation value and little human usefulness.

As the Crystal Basin controversy, mentioned below, illustrates, the current legal arrangement has the consequence, *inter alia*, that any land which the Department acquires, no matter how high its conservation values, automatically initially falls into the category of stewardship land until it is later – very possibly much later – given a higher classification. The Department's classifications cannot, of course, be arbitrary. They must be carefully considered, and based on proper evidence, and the preparation of a case for a higher classification may take some time. All the same, abundant evidence of the high conservation values of the South Island areas identified by the Parliamentary Commissioner and listed above has long existed, and the Department has, in many cases,[28] had 30 years to prepare a case. No explanation of the Department's inactivity can be flattering.

IV. Controversial Exchanges of Stewardship Land

Since stewardship land is merely conservation land not having any specific or particular higher status, it is not surprising that it is not as closely guarded by the law as are other parts of the public conservation estate. Stewardship land is indeed the only part of the estate which can be alienated from Crown

27 "The clear intention in creating stewardship areas was to protect them from development or extractive use until their conservation value could be established, [and] the appropriate form of protection chosen…; unless of course the conservation values were found to be inadequate, when the area would be disposed of…"; Hon Philip Woollaston, Minister of Conservation at the time of the Department's founding, *Stewardship Land and DOC - the beginning* September 2012 at 7 <pce.parliament.nz>. The Conservation Bill initially required that stewardship land was to be managed so that "its inherent character is largely unaltered", but this was changed to a somewhat more specific requirement that "every stewardship area shall be so managed that its natural and historic resources are protected" (Conservation Act 1987, s 25).

28 Not all. St James Station, for example, was run as a pastoral lease; the lease was purchased by the Crown, via the Nature Heritage Fund, only in 2008. All the same, its conservation values were already well-known; they were of course the reason for the purchase. Although figures are difficult to obtain, additions to the public conservation estate by way of Nature Heritage Fund purchases and tenure review under the Crown Pastoral Land Act 1998 must now be of considerable significance in enlarging the area of stewardship land.

ownership. Section 16 (1) provides that "… no conservation area or interest [therein] shall be disposed of except in accordance with this Act", and the only provisions that the Act makes for the disposal of conservation areas deal with stewardship areas, which can be "disposed of", in situations where conservation values are essentially not involved, under s 26, or "exchanged", under s 16A, "for any other land", as long as certain conditions are fulfilled:[29]

> Section 16A Exchanges of stewardship areas
>
> Subject to subsections (2) and (3), the Minister may, by notice in the Gazette, authorise the exchange of any stewardship area or any part of any stewardship area for any other land.
>
> The Minister shall not authorise any such exchange unless the Minister is satisfied, after consultation with the local Conservation Board, that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act …

It was this vulnerability of stewardship land to alienation by way of exchange – and two controversial proposed such alienations, one of which actually occurred – that prompted the then Parliamentary Commissioner for the Environment to write her 2013 report, *Investigating the future of conservation: The case for stewardship land*.[30]

The exchange which did *not* ultimately occur was that of land in the Mokihinui Gorge, in Buller, where Meridian Energy proposed to build a hydroelectric dam which would have flooded the gorge. Meridian's project manager argued that it was an "important fact … that the area … is stewardship land … not in a national park … not in an ecological reserve or specially protected area. The river doesn't have a water conservation order on it …".[31]

On the generally reasonable assumption that the classification of conservation land should reflect that land's conservation value, he could be argued to have a point, but, in the end, the entire proposal was abandoned.

The land exchange which did occur concerned part of an area of high country land, Crystal Basin, adjoining the Porters Ski Area in the Craigieburn Range. The Crown's own Nature Heritage Fund had paid $3.5 million for several thousand hectares of high country land including Crystal Basin, as a "strategic acquisition … link[ing] a number of key protected areas".[32] When the land became part of the public conservation estate, it automatically became stewardship land until given a higher classification. Six years later, the Department had still not got around to that higher classification, and, in

29 Section 16A was inserted into the Act by the Conservation Law Reform Act 1990. The original Act's only provision for the disposal of stewardship areas was s 26.

30 Wright, above n 3.

31 Chapter 5 of the Report, at 41.

32 Chapter 5.2, at 44.

March 2011, the Director-General of Conservation approved the exchange of 196 hectares of that land at Crystal Basin, which would then become the freehold property of the company operating the Porters Ski Area, in return for 56 hectares of relatively rare coastal lowland forest at Steep Head Gully, in Le Bons Bay on Banks Peninsula. The Canterbury Aoraki Conservation Board, which had to be consulted under s 16A(2), had recommended that the exchange be declined.[33] The Nature Heritage Fund was among other organisations also opposing the exchange. Steep Head Gully, for which Crystal Basin was exchanged, was private land, but was effectively already protected by the Banks Peninsula District Plan, and indeed also by inaccessible terrain which had simply made it impossible to log or even, were it cleared, to graze. The land swap could perhaps be argued to have increased the conservation values of the conservation estate, because the estate now included this area of a rare forest type – the exchange might "enhance the conservation values of land *managed by the Department*".[34] But it would not provide a net conservation benefit to conservation generally, because the land becoming part of the conservation estate – Steep Head Gully – was in no danger of destruction, and the land leaving the conservation estate – Crystal Basin – would have its conservation values either remain unchanged or possibly even decline.[35]

In response to public concerns about such exchanges, the Parliamentary Commissioner for the Environment produced her report, which recommended that the Minister of Conservation should "seek advice from the … Conservation Authority to provide guidance on the principles and processes … used when making decisions on net conservation benefit". She also recommended that the Minister "instruct the Department … to identify areas of stewardship land that are clearly of significant conservation value, and reclassify them in accordance with that value".[36]

Occasional land exchanges and sales of parcels of land with little conservation value which the Department has inherited occasionally occur without controversy. Controversy may arise, though, if land of undoubted value is to be lost from the conservation estate. Even when the estate obtains land of conservation value in exchange, concerned citizens may think that the price paid was too high. It may have been possible for the land obtained in exchange to be obtained in some other way.[37] It may not have been necessary

33 The author was a member of the Board at the time.

34 Conservation Act 1987, s 16A(2) (emphasis added).

35 This point was touched upon in the Conservation Authority's January 2016 report, *Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges*, at 2.9.

36 Wright, above n 3, Chapter 7 of the Report, *Conclusions and recommendations*, at 58-59. The Conservation Authority's January 2016 report to the Minister *Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges* was in response to these recommendations.

37 The Court of Appeal in the case around which this article centres observed at paragraph 79 of its judgment that if the land provided to the Department by way of exchange - the "Smedley Block" - were worthy of protection and incorporation within the public conservation estate, the Department could have attempted to buy it directly from its owner.

to exchange the land at all in order to protect the land outside the estate. Steep Head Gully, for example, was, essentially, already protected. If the two areas of land to be exchanged are very different – as in the case of the Crystal Basin and Steep Head Gully exchange – then questions impossible to answer arise about the comparison, metaphorically speaking, of apples and oranges.

Behind all these arguments lurks the fear that development interests and political pressure on the Department may contaminate the process. The development interest is a given – the land is, after all, to be exchanged so that it may be used for some human purpose. Where such a purpose exists, and where very significant projects and sums of money are involved, political pressures of one sort or another upon the Department are only to be expected.

V. The *Ruataniwha* Case; The Legal and Factual Background

An entirely new issue and area of concern arose out of the facts of *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* (the *Ruataniwha* case) decided by the High Court in February 2016,[38] by the Court of Appeal[39] in August 2016 and by the Supreme Court in June this year.[40] The case concerned a proposed land exchange, but also one entirely new issue. That issue's momentous implications obliged the Royal Forest and Bird Protection Society, in the public interest, to pursue the case from the High Court, where it was unsuccessful, to the Court of Appeal and then (after the Society's victory there) to be taken by the Department to the Supreme Court. Palmer J in the High Court found for the Crown; two of the three judges of the Court of Appeal for Forest and Bird. The weight of judicial opinion was therefore evenly balanced when the matter reached the Supreme Court.

The land exchange in question was desired by the Hawke's Bay Regional Investment Company in order to make possible the building of an 83-metre-high dam on the Makaroro River. The lake behind the dam would inundate the stewardship land concerned.[41] The conservation land was sought only in order that it could lawfully be inundated by the new lake. The purpose of the dam was to "provide a long-term sustainable water supply solution for Central Hawke's Bay"[42] by providing irrigation for up to 27,000 hectares of land, some of which, anyway, would undoubtedly be used for more intensive land uses – including dairying – than those prevailing at present. In exchange for the surrender of 22 hectares of conservation land in two different locations

38 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [The *Ruataniwha* case][2016] NZHC 220; (2016) 19 ELRNZ 370.

39 *The Ruataniwha case* [2016] NZCA 411.

40 *The Ruataniwha case* [2017] NZSC 106.

41 The whole scheme is however generally referred to as the "Ruataniwha Scheme", even though this dam was proposed for the Makaroro.

42 Hawke's Bay Regional Investment Company Ltd *Slides for the Ruataniwha Water Scheme Public Meeting 6 August 2015*.

in the Ruahine Conservation Park the Department would acquire 146 hectares, later increased to 170 – the "Smedley Block", adjoining the Ruahine Conservation Park nearby. (The conservation values of the Smedley Block are not entirely clear; in the Supreme Court judgment is it described as "currently being grazed",[43] but it rationalised the boundaries of the Conservation Park and evidently contained patches of conservation value.)

What would good stewardship, and the purposes of the Conservation Act, require? The exchange would enlarge the public conservation estate. The Smedley Block was argued by the Department to enhance the estate's conservation values. Human prosperity would certainly be enhanced, as water was made available for agriculture for reliable irrigation. The Department would show itself to be a reasonable landowner willing to recognise and accommodate the wider public good where that was desirable and possible.

On the other hand, the dam would drown an area of the conservation estate – not a large area, but one with conservation value. It would block a river's natural flow and fish movements for ever. It would promote agricultural intensification which was widely expected to intensify downstream nutrient loads and affect downstream water systems.

But beside those objections, a land exchange in this case would establish a frightening precedent; for at the beginning of this particular land exchange process the conservation land concerned was *not stewardship land at all*. The land had a higher status; it was part of the Ruahine Forest Park – deemed, by s 61(2) of the Conservation Act, to be a conservation park.

Section 16(1) of the Conservation Act provides that "… subject to the Public Works Act 1981, no conservation area … shall be disposed of except in accordance with this Act".

The only provisions which the Act then makes for disposal of conservation areas are to be found in s 16A, quoted above, dealing with the exchange of stewardship areas, and s 26, dealing with their disposal upon very strict conditions in what are therefore uncontroversial situations.

Those provisions might lead us to conclude that only stewardship areas may be disposed of, by one means or another, and that after stewardship land has been allocated a higher status it will remain part of the public conservation estate for all time; or until such time, anyway, as a future parliament might choose to amend the existing law.

Part 4 of the Act, however, deals with extra levels of protection. Section 18(1) provides that:

> … the Minister may … declare any land … held under this Act for conservation purposes to be held for the purpose of a conservation park, an ecological area [or other purposes] and, subject to this Act, it shall thereafter be so held.

43 *The Ruataniwha case,* above n 40, at [8].

Sub-section (7) then provides that subject to an obligation to give public notice and hear objections:[44]

> … the Minister may … vary or revoke the purpose or … purposes for which any land or interest held under sub-section (1) is held; and it shall thereafter be held accordingly.

In this particular case the Minister had delegated this revocation authority to the Director-General, Mr Lewis Sanson.

Conservation parks and ecological areas, then, are not necessarily forever. National parks, under the National Parks Act 1980, are to be "preserved in perpetuity".[45] The Reserves Act 1977 provides for the "preservation and management" of reserves for the benefit of the public, and s 24 requires that any change in classification of most reserves may be made only after the physical reason for the original classification has been destroyed or has disappeared.[46] But the status of conservation parks and ecological areas can be revoked by a very simple procedure. But by what criteria and for what reasons may this be properly done?

The question has considerable practical significance. New Zealand has 30 conservation parks, generally ranging in size from around 50,000 to 150,000 hectares. Their total area is somewhere around 18,000 square kilometres. This area, and the number of parks, could well increase in future if the Department reclassifies current stewardship land as conservation park. (Stewardship lands could, of course, be given different higher classifications.)[47]

Covetous eyes still watch the conservation estate. Forest and Bird understands that there are "proposals by developers that would result in flooding areas in both Lake Sumner Conservation Park in Canterbury and the Oteake Conservation Park in Otago".[48] A suitable decision of the Supreme Court would have raised developers' hopes for similar downgrading of protected land status for their irrigation schemes. A new proposed land use would not necessarily have to be for agriculture, and the conservation land affected need not necessarily be only on the frayed margins of the conservation estate. A private party wanting to build an hotel, for example, in some remote and beautiful place classified as conservation park, might offer a larger area of different land elsewhere in exchange. If the status of conservation park could be revoked, not for conservation reasons but only in order to effect a land

44 A similar provision applies to wilderness areas and sanctuary areas. By s 18AA, it is the Governor-General who declares these areas to exist, and who may revoke such a declaration; conservation parks and ecological areas, not quite so special, are dealt with by the Minister alone.

45 National Parks Act 1980, s 4(1). Section 11 (1) declares that "No area of land … included in any park shall be excluded from that park, except by Act of Parliament".

46 Section 15 also authorises the Minister to exchange reserve land for other land to be held as part of that reserve. The extent of that power, and its relationship with s 24, is unclear.

47 But it is also possible that the effect of the Supreme Court's decision will be to make future governments more reluctant to grant stewardship areas a higher status; see Part X below.

48 Forest and Bird fundraising appeal letter, 24 February 2017.

swap under s 16A of the Conservation Act, then a very large part of our public patrimony would be liable to be traded away.

The grounds on which a revocation of conservation park status may be made under s 18(7) are therefore a matter of great public importance.

VI. The Purposes of the Conservation Act

The issue in the *Ruataniwha* case was a simple one. In moving from the initial situation, where the land concerned was conservation park, to the Department's intended final situation, where the land had been exchanged for other land, the Department had to make two decisions. The first decision was whether or not to revoke the status of conservation park for these particular little areas, thereby reducing them to the status of stewardship land. Then, after that had been done, the second decision was whether or not to exchange this newly-created stewardship land for the Smedley Block.

Obviously, these two decisions were intimately connected. The whole purpose of the first step, revoking the conservation park status, was to make the land available, as stewardship land, for the second step, of exchange. The Department's decision-makers knew this perfectly well and openly referred to it when making the first decision. But nevertheless, there were two distinct decisions to be made. Forest and Bird argued that knowledge of the ultimate intended destination of the land (as a consequence of the second decision, about exchange) had improperly tainted or infected the first decision.

On what ground had the Department made its first decision? And whatever that ground was, was it a proper ground under the Act?

The test for the second decision, about the exchange, is spelt out in s 16A – the exchange must "enhance the conservation values of the Department and promote the purposes of the Act". But what guidance did Parliament give as to how the first decision, to revoke conservation park status, was to be made?

On this matter the Act is completely silent. Forest and Bird argued that Parliament's clear intention that only stewardship land was available for exchange meant that any downgrading of land from another status for the purpose of exchange was *ipso facto* improper.[49]

The Departmental decision-makers, Palmer J found in the High Court, "did not pretend to be considering revocation independently of the exchange".[50] Indeed, he considered that decision-makers came "perilously close to risking the wrong legal test being applied to the revocation decision". The only test identified in the Department's decision paper was the s 16A test for exchange, which is of course the second decision. The phrase in s 16A, just quoted above, was "formulaically recited in the decision paper and its recommendations".[51] Although the decision-makers were clear that there

49 The *Ruataniwha* case, above n 38, at [65].
50 At [74].
51 At [75].

were two distinct decisions to be made, "the basis on which the [revocation] decision was made is harder to establish".[52]

As well as this suspicious dearth of evidence, a general principle of statutory interpretation sensibly requires that general powers granted by statute must be exercised only for the statutory purposes.

Few would be surprised by Palmer J's view that "the promotion of conservation purposes, broadly interpreted, is at the heart of the Conservation Act". But what are those purposes? The Act's definition of conservation is so broad as to be non-justiciable in any but the most egregious circumstances. It must surely be capable of being interpreted in a broad policy-oriented way. Moreover, the Act contains not just a definition of conservation but also one of "nature conservation". Nature conservation is somewhat more specifically directed at preserving and protecting native species. But nature conservation is not the Department's purpose. It is the purpose of the Conservation Authority, but the Department's purpose is merely conservation. *Ergo*, conservation must be something rather broader. Since the Act itself contemplates land exchanges, in certain circumstances, could they not be said to be part of the conservation purpose?

The big picture policy approach of senior Departmental decision-makers could well be argued to be within the Act's general conservation purpose. Forest and Bird could well be argued to be placing too narrow a construction on the conservation purpose[53]. As the Director-General's was "convinced that what was offered to and accepted by [him] well and truly meets the purpose of the Conservation Act and is a good outcome for the Department and conservation"[54], His Honour considered that the Director-General had satisfied himself that there was a "good and proper basis, founded in conservation purposes broadly interpreted, for the revocation decision".[55]

The essential question, then, was simply one of how broad or narrow "conservation purposes" were to be interpreted. Forest and Bird's approach was that revoking conservation park status could only be done if the land in question no longer deserved such status. Any consideration of a possible exchange was improper. The Department argued that the purpose of the Act was to promote conservation, and for that purpose the Crown was entitled and indeed obliged to "take a global view of the conservation implications of the revocation decision rather than focussing on one particular resource in isolation".[56]

The Department would doubtless argue that an exchange would not only enlarge the conservation estate but also allow the satisfaction of the demand

52 At [77]–[78].

53 At [73]. "Indeed, Forest and Bird acknowledged … 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" (at [72]).

54 At [78] and [79].

55 At [80].

56 At [49].

for irrigation water. It would not help the wider cause of conservation if the Department and the public conservation estate were to be perceived as dogs in the manger and obstacles to economic development.[57]

Forest and Bird would argue that the Act's broad conservation purposes are best achieved by jealously guarding what has already been declared to be a valuable part of the public conservation estate. It is a perilous precedent to "treat … the conservation estate as a fungible business portfolio".[58]

Forest and Bird might also argue, surely, that if the Department were to take a "global view" of conservation[59] – and His Honour found that "the reference to the promotion of conservation of New Zealand's natural and historic resources in the [Act's] long title is to a broad and collective concept"[60] – then the Act's definition of conservation is ultimately not just limited to the conservation estate, and so the effect of a dam on a river's natural flows and life, and the effect of irrigation and intensified agriculture on the plains below, should also have been considered. Has the Department no duty of stewardship beyond the boundaries of the public conservation estate?

VII. The *Ruataniwha* Case; The Court of Appeal's Approach

In the Court of Appeal, Harrison and Winkelmann JJ took Forest and Bird's narrower approach, that revocation of conservation park status under s 18(7) had to be made solely by reference to the "particular resource". A "relativity analysis" of the type undertaken by the Director-General, comparing losses and gains, was inappropriate for that decision. Section 18(7)'s function was to enable land to be reclassified if that were necessary to reflect its actual conservation value. Conservation park status might have been erroneously applied in the first place, or perhaps a natural disaster has altered the land so that that status is no longer appropriate. But a decision to revoke protected status to enhance the overall conservation estate goes too far.[61]

The Act's Parliamentary history, closely examined by the Court, suggested that the first question was the correct test.[62] The definition of "conservation park" which makes mention of recreation, was also pressed into service, although the Court was wary of a "revolving door between … stewardship

57 "It would be artificial and inimical to good public administration for … the revocation decision … to be prevented by law from taking into account the merits of the proposed land exchange." At [70].

58 At [76].

59 At [49].

60 At [61].

61 At [50] of the Court of Appeal judgment, above n 39.

62 At [55]. The Conservation Law reform Bill 1989 originally proposed allowing s 16A exchanges for all conservation areas.

areas and conservation park based on whether the land concerned happens to be an area for recreation at any given moment".[63]

The Court also found a "clear and dominant message" in the Act's definition of "conservation", which included maintaining *intrinsic values* providing for appreciation and recreational enjoyment by the public and safeguarding the options of future generations.

Buller Electricity Ltd v Attorney-General[64] concerned "disposal" of stewardship land under s 26. That was a different situation from that at issue here; but both cases at least involved alienation of the conservation estate, and Doogue J found that:

> 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.

Therefore, "the whole concept of conservation [was] predicated upon maintenance of the status quo once *land* is found to meet the statutory requirements."[65] Broad general policy considerations such as the Director-General relied on could not stand against the text and purpose of the Act.

Reviewing the Director-General's evidence, it was clear that he did not base the revocation decision on intrinsic values. He acknowledged that the exchange proposal, and that alone, was the reason. Both Departmental decisions – to downgrade the land's status, and then to exchange – were driven by the same objective. Since the Court considered that a change in land's intrinsic values was the only proper reason for revocation, the revocation was invalid.

VIII. The Supreme Court Decision

The decision of the Supreme Court, released on the morning of 6 July, was the lead item on National Radio's midday news bulletin. There was widespread coverage in many news media over the next few days[66].

A majority, Elias CJ, and Glazebrook and Arnold JJ, affirmed the Court of Appeal's majority decision. William Young and O'Regan JJ dissented. As opinion was also divided in the Court of Appeal, and Palmer J at first instance found for the Crown, the total score of judges for and against, if one may do something as undignified as a headcount, is a close 5:4.

63 At [62].

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

65 At [57].

66 The Christchurch Press, however, published nothing on the decision in its edition of 7 July, and on 8 July merely one paragraph of eight lines on page 2.

This difference of opinion must diminish the decision's moral authority somewhat. Within 24 hours the Minister of Conservation, the Hon. Maggie Barry, had suggested that the government might well seek to amend the Conservation Act in order to allow such exchanges,[67] and Sir Geoffrey Palmer had publicly declared that such an "over-ruling" of the Conservation Act would be a "constitutional outrage".[68]

The Minister could surely have replied that four excellent judges agreed with the Department's interpretation of the Act. There is nothing inherently outrageous or unusual about Parliament changing a statute which runs contrary to desired policy. Legislation is not the same thing as "over-ruling", and, in any case, Parliaments are sovereign.

The Minister also suggested that any law change would not be retrospective so as to affect this particular case. She did not even mention the highly relevant recommendation of the New Zealand Conservation Authority in January 2016, that the Conservation Act be amended so as to authorise the exchange of other categories of land above stewardship land – in particular, conservation parks.[69]

The Supreme Court readily found that decisions on revocation had to be made on the basis of the intrinsic values of the land in question, and not by way of comparison with other land elsewhere.[70] In the case of a conservation park, as here, the "conservation purposes" which prompted protection were the natural and historic resources of the land and waters.[71] If a comparative approach were taken then "erosion of protection [would be] inevitable", because "it is likely that there will often be other land that would come out ahead on the sort of comparative assessment here undertaken".[72] It was always accepted by the Department that the 22 hectares had conservation values that warranted protection; had it not been for this proposed exchange, they would have continued to be protected within the conservation park. That being so, the revocation decision was clearly driven by the s 16A enhancement-of-the-conservation-values-of-land-managed-by-the-Department test, and for that reason the decision was unlawful.[73]

IX. Fettering the Minister's Discretion

Only time will tell whether any future Parliament might amend the Conservation Act as desired by the then Minister. If Parliament should

67 Radio New Zealand "Government eyes law change after dam decision" (6 July 2017) <radionz.co.nz>.

68 Radio New Zealand "Land-swap law change would be a 'constitutional outrage'" (6 July 2017) <radionz.co.nz>.

69 See Part X, below.

70 *The Ruataniwha case*, above n 40, at [109].

71 At [112].

72 At [119].

73 Paragraphs 126 and 127 offer a succinct summary.

amend the law, it might be that the Court's views on another issue is of more significance in the longer term, assuming, of course, that Parliament does not alter that matter also. That matter is the so-called "fettering of the Minister's discretion".

The Act grants powers to the Minister. Section 17Q, for example, says that "[s]ubject to this part, the Minister may grant a concession …". Ministers may issue permits. They may dispose of stewardship land:[74]

> Fettering … means placing limits on the statutory discretionary powers of the Minister (and the officials to whom she has delegated those powers). Most of the important decisions made by the Minister and her delegates are made under such powers which, as they are expressed in the Conservation Act itself, are discretionary. A power is fettered when limits are placed on its use over, above and separate from any limits or constraints to be found in the statute conferring the power or in general public law principles about proper decision-making. The rationale is that when Parliament conferred broad powers on a Minister, Parliament must have intended the Minister to exercise her discretion subject only to any limits or constraints in the statute conferring the power.

Accordingly, the Department's policy has long insisted that conservation management strategies and plans must never impose blanket rules,[75] but must always leave a discretion with the Minister. To make planning documents binding on the Minister would be improperly to fetter her discretion.

So, in CMSs, for example:[76]

> … limiting statements are not favoured, and an effects-based approach is preferred. To state that "[c]oncessions are considered inappropriate in the Caples Valley" is limiting and improper. But to state that "[a]dverse effects on the current recreational opportunity in the … Valley shall be avoided, remedied or mitigated" is "effects-based" and "acceptable".

In the latter case, of course, the Department's discretion as to the granting of concessions in the Caples Valley is so enormous as to place any decision except the most egregious beyond legal review.

74 Extracts from briefing paper by Jeff Connell, then Otago Conservator, to the Otago Conservation Board, 3 July 2001 (Agenda Item 6.1(b) Report 0161).

75 See above, n 73.

76 See above, n 73.

It had always been difficult to reconcile the Department's approach with other provisions of the Act. By s 17Q the Minister may grant a concession; but by s 17T (2) the Minister "shall" decline an application if it is inconsistent with the provisions of any conservation management strategy or plan. As Mr Connell observes, s 17N (2) says that no conservation management strategy "shall restrict or affect the exercise of any legal right or power by any person other than the Minister or the Director-General …". This must surely imply that strategies can restrict the powers of the Minister and her delegates. Fettering is entirely permissible, and indeed mandatory, if it is authorised, directly or indirectly, by the Act itself.

In arguments in the Supreme Court in the *Ruataniwha* case the Crown abandoned the argument it had used in the High Court and Court of Appeal that the actual provisions of the actual planning documents were simply immaterial in this case. It had become clear that provisions in those documents definitely argued against revocation and exchange. Instead, the Crown argued boldly that "planning instruments do not bind the Minister and could not constrain her decision-making power under s 18(7)".

The Court could not accept that. It had no doubt that the Minister and her delegate were bound to exercise their powers "in accordance with the policies expressed in the planning instruments formally adopted under the Act".[77]

Plans are important. They ensure consistency of decision-making. Many important interest groups expend a great deal of energy in their creation. It would be most wasteful of those efforts if the Department were then simply free to ignore them. The Department wields immense influence in plans' development. Not only lobby groups but even Conservation Boards themselves sometimes have to struggle to have good conservation provisions in the plans.[78] It would be most wasteful of public energies if those plans could at the end of the process simply be ignored by the Department. Why would Parliament have provided for the laborious creation of plans that were so pointless?

If the Department could simply ignore carefully prepared plans, and be bound only by the very general words of the Act, then its arbitrary power would be great indeed, and its duties of genuine stewardship minimal indeed.

In the *Ruataniwha* case, then, the decision-maker was obliged to respect and comply with statements of land exchange policy in the Conservation General Policy[79] and the Hawkes Bay Conservation Management Strategy.[80] The attitude of those instruments was that an exchange is appropriate only when the conservation land to be disposed of has low conservation values.

77 At [130].
78 At [131].
79 In accordance with which all conservation areas and natural and historic resources shall be managed – s 17A Conservation Act 1987. Policies are prepared in accordance with s 17B.
80 Prepared under s 17D, and also governing the management of conservation areas and natural and historic resources – s 17A.

These policies were to be respected whenever land reclassifications or exchanges might occur, not just when more general reviews were initiated by the Department.

If the Minister were obliged to respect such statements as that, it might not be absurd to imagine a future where a Minister is obliged to respect statements in CMSs that more appropriate higher levels of protection be given to stewardship land. The trick, of course, would be getting such statements into a CMS in the first place.

The fettering objection is used to justify many Departmental discretions. In *Ruataniwha* it was used in an attempt to justify a land exchange. But the Court's condemnation of the fettering excuse must surely extend to other categories of Ministerial power - to the granting of concessions and licences, for example. The exercise of the Department's discretion there is occasionally the subject of private and even public disquiet.[81] For the Department to forgo inscrutable discretion, and instead be subject to the rule of law, is an advance which will be welcomed by many different interest groups.

Perhaps one day the Department's respect for Conservation Management Strategies might even move it to comply with s 17H(4)(b) and review them every 10 years as required, rather than considering itself to be free to review or not review as it pleases.[82]

An intriguing side issue in *Ruataniwha* concerned marginal strips. By s 24 of the Conservation Act[83] these must be reserved alongside rivers, lakes or foreshore whenever there is a "disposition of land" by the Crown. Both the blocks of conservation park land to be exchanged for the Smedley Block were, of course, beside the Makororo River. If this exchange were a "disposition" of land of the sort contemplated by Part 4A, then even after exchange of the rest of the land the Department would still hold marginal strips beside the Makororo River, which still could not, then, lawfully be flooded. The proponents of the dam would be no further ahead. None of the various exceptions to the marginal strip requirement was argued by the Crown to apply,[84] and it would be absurd to say that alienating land by exchange was not a disposition. It may well have been a serious error of the dam proponents

81 Several examples of public controversy are mentioned in Part XI, below.

82 A *Progress report on the status of CMS and management plans*, 20 May 2015, prepared by Sarah Bagnall for Meeting No. 143 of the New Zealand Conservation Authority (Agenda Item 143.14) lists two CMSs 20 years old for which "review [is] not currently scheduled within the next five years", as well as three other CMSs, 19, 23 and 25 years old, for which the review process is just beginning. Admittedly, s 17H(4)(c) does allow the Minister to extend the ten-year period after due consultation; but can such administrative leeway really extend to 25 years? That sounds more like an exercise of the forbidden dispensing power. Surely the extension provision was intended to cover only minor delays?

83 The Conservation Act 1987, Part 4A, "Marginal strips".

84 Under s 24B an exemption from the marginal strip requirement is possible if "the land has little or no value in terms of the purposes specified in s 24C"; an argument to that effect might be possible if the whole 22 hectares were not considered worthy of protection. Under s 24E marginal strips may also be exchanged in certain circumstances. But "[t]hese matters are not before the Court on the present appeal" (Para 151).

not to take into account the requirement for these marginal strips. But it was undoubtedly the case, as Palmer J held in the High Court, that "an exchange of land under s 16A is a disposition which triggers the reservation of marginal strips adjoining streams of three metres or more in the absence of any exemption".[85] The marginal strips had not yet been created, and so the problem was perforce one for future adjudication. "The consequences for the … Water Storage Scheme of the marginal strips created are not currently before us."

X. Stewardship Land in the Future

The Supreme Court's decision does mean that this particular threat to the integrity of the public conservation estate - alienation of specially-protected areas by their appointed stewards or guardians - has been averted. The longstanding understanding that protected lands are to remain so indefinitely has been affirmed. In recognising the importance of management plans, also, and in dismissing the Department's arguments about fettering the Minister's discretion, the Court recognised that the Department is not a law unto itself, but is indeed a steward guarding lands owned by the public.

Although to a considerable extent an affirmation of the status quo, however, the course of the litigation, and the ultimate decision, have changed a great deal.

It is now firmly established that once lands are dedicated to conservation purposes, by being given a higher status than stewardship land, then, barring extreme events, they are to have that status indefinitely. It is the Minister, or the Governor-General on the recommendation of the Minister, who declares stewardship land to have additional specific protection or preservation requirements; and the knowledge that such declarations are irrevocable will inevitably make certain Ministers and governments reluctant to make them in the first place. The end result – subject to any obligation possibly imposed on a Minister by planning documents – might well be the opposite of the Parliamentary Commissioner's 2013 recommendation that the Department hasten to reclassify areas of stewardship land of significant conservation value.

As for lands already of higher status than stewardship land, the decision, if it stands, will undoubtedly make more difficult the little minor boundary adjustments often necessary for state highways, electricity generation and other public works.[86]

On the other hand, it is not impossible that Parliament might see fit to amend the Conservation Act. Time will tell. The Minister has already raised that possibility, and has been condemned for doing so. Yet the New Zealand Conservation Authority's January 2016 report to the Minister, *Stewardship*

85 At [161].

86 Vernon Rive *Legal test for land swaps under the Conservation Act 1987* (2016) 11 BRMB 210.

Land: Net Conservation Benefit Assessments in Land Exchanges, prompted by the Parliamentary Commissioner's 2013 report, and which acted on her recommendation to provide guidance on principles and processes to be applied when deciding questions of net conservation benefit, also suggested that the power to authorise exchanges could well be extended beyond stewardship lands to other categories of conservation land – in particular, to conservation parks.[87] It pointed out that "in many instances the boundaries of conservation parks have arisen for historical reasons rather than … a particular assessment of conservation values …"

XI. The Department of Conservation in the Future

Regardless of the ultimate outcome, however, the very existence of the litigation has undoubtedly eroded the credibility of the Department among conservationists as a principled and trustworthy advocate for conservation and defender of the public conservation estate. Perhaps behind the scenes the Department furiously opposed the Minister's desire to revoke the conservation park status of those 22 hectares. In public, anyway, the Department was relaxed and compliant. The final revocation decision was the Director-General's; it was to him that the Minister had delegated her power. The author was present at 13 June 2015 Annual General Meeting of Federated Mountain Clubs (FMC) in Christchurch, when the Director-General, Mr Sanson, was the guest speaker. This was at the time when the litigation under discussion was pending but had not yet been heard by the High Court. Mr Sanson certainly gave those present to understand that he was not entirely unhappy that Forest and Bird was contesting the proposed revocation of conservation park status. Nevertheless, he did not appear unhappy with his Department's position. This mature *realpolitik* was not much comfort to members of Forest and Bird watching their Society spend a great deal of its funds doing the Department's job for it, and indeed despite it.

Conservationists have long harboured mixed feelings about the Department. It undoubtedly does some splendid work, and makes decisions which conservationists applaud. It also makes decisions which cause increasing dismay. Conservation work is sometimes perceived as being relatively remote from the hurly-burly of politics. Nevertheless, the Department attracts a considerable amount of controversy. Its actions, or inaction, are increasingly

87 New Zealand Conservation Authority, above n 35, at 2.22. The report also recommended, at 2.16, that "the reclassification of stewardship land to other categories should not be prioritised over other work of the Department". This is because the Authority considered that stewardship land actually *was not* "less protected" than other categories of conservation land. See Part 6 of the Report, *Stewardship Land - How protected is it?* The Authority's point of view on this matter differs from that of the Parliamentary Commissioner, and might seem to be contradicted by the further point made by the Authority that if stewardship land were given higher status then the granting of concessions and exchanges would be more difficult (Part 7, "Implications of Reclassifying Stewardship Land under Existing Legislation").

at odds with conservationist expectation of what "their" Department should be doing. Conservationist criticism of the Department would indeed be much sharper were it not for the fact that the Department, for all its imperfections, still appears to be better than any alternative.[88] Conservationists often fear that public criticism of the Department may serve the interests of those who would like to see the Department done away with altogether. Yet it might be better for the Department in the long run if criticism were less muted and more trenchant.

The courts, not the Department, thwarted this proposed alienation of a specially protected area for no other reason than to assist further intensification of agriculture downstream. The Department has been ready to flout its own Fiordland and Mt Aspiring National Park Management Plans for the greater convenience of the tourism industry.[89] Indeed, at the FMC AGM referred to above, the Director-General indicated generally that somewhere about half of the Department's budget would be spent on matters related to tourism; even though s 6(e) of the Act specifically declares that, subject to the over-riding duty to conservation, the Department may "*foster* the use of natural and historic resources for *recreation*", but only "*allow* their use for tourism" (emphasis added).

When, in 2016, the government announced its objective of eliminating certain deadly introduced predator species from New Zealand by the year 2050,[90] it proposed to entrust the task not to the Department, but to an entirely new Crown entity, to be called Predator Free 2050 Ltd. The proposal was, certainly, for the removal of those pests from all of New Zealand, not just the public conservation estate. Nevertheless, one cannot but wonder why the Department was not given the job. The chief purpose of removal was a conservation purpose. Eradication operations would begin on the conservation estate, and for some years be carried out only there. The Department has considerable expertise in such operations and indeed conducts some now. The decision not to give the job to the Department surely calls for explanation.

The Department has more than once displayed a strong desire to abandon, in one way or another, numerous back-country huts and tracks. A significant amount of the maintenance of many public tracks and huts less frequented by tourists is now done by volunteers, financially assisted by funds administered by Federated Mountain Clubs (FMC), the New Zealand

88 "And always keep a-hold of Nurse/For fear of finding something worse." Hilaire Belloc "Jim, Who ran away from his Nurse and was eaten by a Lion" in *Cautionary Tales for Children* (Eveleigh Nash, London , 1907).

89 Discussed in DJ Round "Restoring the Mana of the Whenua, The Battles over the Birds" [2016] NZJ Envtl L 203.

90 See above, n 89, "A Crown entity – Predator Free 2050 Ltd – has been created, but it is not evident how this organisation will interact with the Department of Conservation …"; Parliamentary Commissioner for the Environment *Taonga of an Island Nation; Saving New Zealand's Birds* (May 2017) at 99.

Deerstalkers' Association (NZDA) and Trail Fund New Zealand.[91] These three organisations together form the Backcountry Trust (previously the New Zealand Outdoor Recreation Consortium), and volunteers keen to maintain, repair or even create huts and tracks can apply for funding from funds which the Trust administers. The funds come from the Department's Community Conservation Partnership fund; but the work is done not by Departmental staff but by volunteers. Since they are volunteers, and the money is spent chiefly on the purchase and transport of materials, the money goes much further than it would if the Department itself were doing the work.

Given the Department's new emphasis on serving tourism, such volunteer work on huts and tracks may be necessary if many huts and tracks are to receive any attention at all. How long will it be before volunteers, irritated at being mere unpaid labour, begin to demand a more significant role in the administration of such areas? We tend to think that the threat of privatisation of the public conservation estate will come from big business interests, but might it not also come from humble lovers of the wilds who eventually tire of being unpaid servants taken for granted by a Department whose interests and priorities are increasingly focussed elsewhere?

Then, for what it is worth, a Game Animal Council exists,[92] and although only of limited influence at present, it will doubtless seek to extend its influence.

The Department, then, seems already on the way to losing much of its authority and involvement in native species recovery, basic back-country public recreation and game animals, and becoming much more involved in servicing the tourism industry. This is not the good steward envisaged when the Department was established in 1987.

XII. Conservation's Future

Other straws in the wind suggest that, as human populations and human pressures on the limited resources of a finite planet continue to increase, more demands will inevitably be made that the public conservation estate, regardless of how precisely it is classified, be unlocked for human use.

As mentioned above,[93] proposals already exist to flood portions of the Oteake and Lake Sumner Conservation Parks for the sake of irrigation schemes downstream. A hydro-electric scheme is proposed for the Morgan Gorge of the Waitaha River, a significant and spectacularly wild major South Westland river, but still only stewardship land.

91 According to its website, "a charitable national organisation supporting volunteer-led sustainable trail building throughout New Zealand. Run by and for volunteers" <trailfund.org.nz>. Although not specifically stated, its membership appears to be chiefly mountain bikers, and the trails it builds are for mountain bikes.

92 Established by the Game Animal Council Act 2013.

93 Part IV.

The Royal Forest and Bird Protection Society alleges that a secret cross-department plan exists –developed for the Ministers of Conservation, Energy and Resources, and Economic Development – which would make public conservation land available to privately-owned coal mining companies. The Society is dismayed that the Minister of Conservation, "rather than publicly advocating for the protection of conservation land, [is] instead working in secret to make that land available to destroy for private profit".[94] A controversial opencast coal mine already operates on the Denniston Plateau, part of the public conservation estate. There are proposals for other opencast mines nearby.

It is already possible, in certain circumstances, to remove timber from parts of the conservation estate for commercial purposes. This was the effect of the West Coast Wind-blown Timber (Conservation Lands) Act 2014, which authorised the recovery of trees blown over by the particularly damaging Cyclone Ita, in areas which included not just stewardship land but also reserves and forest park. The Act provided for no public scrutiny, not even by the local Conservation Board. Timber to be taken included not only actually toppled timber but also "irreversibly damaged" timber, "damaged to the extent that it is likely to die in the near future".[95] The Act exempted logging from restrictions under the Conservation Act, Reserves Act and Wildlife Act,[96] and from certain sections of the Resource Management Act.[97]

The Act covered only trees felled by that one storm, and is due to expire in 2019. Nevertheless, not so long ago the public conservation estate was to be left entirely to natural processes; and there will be more storms.[98] Already, the 2017 West Coast Economic Development Action Plan has proposed "enabling long-term access to windblown [native] timber on public conservation land", as well, indeed, as "identifying low value conservation stewardship land that could be disposed of".[99]

Such pressures will continue and increase. Stewardship land will, obviously, be particularly vulnerable; but all conservation land is owned, essentially, by the people, and if the people's Parliamentary representatives choose to amend or repeal protective legislation, even the National Parks Act, then they can. The people are *all* the people; not just the few hardy and yearning souls who visit and love these places, not just the ones who love but never visit, but

94 Caitlin Carew "Did anyone ask you if this was OK?" Forest and Bird Magazine (New Zealand, Winter 2017) at 6.

95 West Coast Wind-blown Timber (Conservation Lands) Act 2014, s 5.

96 At s 17.

97 At s 19.

98 See Owen Cox, *West Coast Wind-Blown Timber Act*, August 2014 FMC Bulletin, at 24–27. Perhaps inspired by the Act's example, the Grey District Council is now considering a plan to "sustainably harvest" native trees in three of its own reserves; Caroline Wood "Mad plan to log native forests" *Forest and Bird Magazine* (New Zealand, winter, 2017) at 28–29.

99 West Coast Governance Group *Tai Poutini West Coast Economic Development Action Plan 2017*. Published by the West Coast Governance Group, and supported by all West Coast mayors and the chair of Development West Coast. The plan also raises other possibilities which would intrude very significantly on the public conservation estate.

every citizen of distant northern conurbations who have never heard of these places and will never care, but who do expect that the Members of Parliament whom they elect will provide them with the lifestyle to which they would like to be accustomed.[100]

In the *Ruataniwha* controversy some conservationists hoped for rather more visible commitment to the integrity of the conservation estate from senior Departmental officials. As long as the government's desire for land reclassification was lawfully justified by the Conservation Act, however, the duty of public servants is loyally to serve elected governments. Perhaps those officials, whatever their private feelings, thought that half a loaf was better than none, and that conservation was better served by unpalatable compromises than by defiance and defeat.

In many of its attitudes and effectiveness, the Department is already a far cry from what it was, and was expected to be, at the time of its creation. Its decline is a consequence of the decline of conservation as a major political issue. That decline in turn arises out of our discovery that the physical resources demanded by our population and lifestyles are not as limitless as we had supposed a generation ago. Conservation now comes at a cost. Even the Department's constant reorganisations, with consequent unfortunate loss of institutional memory and experienced personnel, arise out of the political weakness of the cause it represents. In the last resort the Department can only be as strong, legally and politically, as the wider conservation movement. Government officials will only be good stewards if most citizens require them to be; if most citizens are good stewards themselves. Paradoxically, in an era of environmental crisis, the environmental movement is not the power in the land it once was.

Popular support aside, it was always unrealistic to expect the Department of Conservation to be forever a noble and incorruptible force for good. The Department is a bureaucracy like any other, subject to the same pressures, prey to the same ills, and working in the same way. No more can be expected.

It will not even be enough to give natural objects their own legal personality, as has recently been done with Te Urewera[101] and the Whanganui River,[102] for those natural objects must still have decisions made for them by human beings. One could argue that their particular legislation expects responsible decisions by their human stewards. But then, one could once have said the same thing of the Conservation Act.

100 According to Radio New Zealand "Special Economic Zones still on the table" (12 July 2017) <radionz.co.nz>, the government is still considering the possibility of "Special Economic Zones" where investments and developments could be "sped up … by by-passing existing rules". Coal mines, aquaculture and tourist developments would be particularly expected to benefit.

101 Te Urewera Act 2014, s 11.

102 Te Awa Tupua (Whanganui River Claims Settlement Act) 2017, s 14.