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Private management of 'the public interest'?

Freehold with covenants etc., vs public ownership of the South Island high country

A review of 'protective' mechanisms for nature conservation, public recreation and access over private land, compared to public ownership and control

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Representatives of government and some state servants are increasingly making statements that, in relation to provision of public access or to further nature conservation goals over natural lands, the prime issue is not one of land ownership but one of "access" or "management". Similar claims are also being made by runholder representatives.

In their quest to avoid responsibility for management of natural lands, Government is advocating mechanisms under private ownership that are supposed to satisfy public conservation and recreation needs. It is unsaid, but implied, that these mechanisms can do as well, if not better, in protecting the 'public interest' than public ownership—that is that retention of Crown ownership of these values is unnecessary. Government and officialdom have not publicly stated the basis for their preferred 'mechanisms' in comparison to the protections provided by public ownership and management.

The most recent statement of faith in private ownership of public resources is a 'draft discussion document' released in June 1994 by the Minister of Conservation, entitled **'Public Interest Goals for the South Island High Country'** . The paper's authors argue that it is "constraints on managers" that are important, rather than who the managers are. They argue that there is a place for 'privately owned protected areas' containing values of 'public interest'. It continues—

> *"The high country can be owned or managed by individuals, or by the Crown. Each can manage for the prime objective of production, commercial recreation, or conservation".*

There is no mention of provision for public recreation. There is no acknowledgement or discussion of inherent conflicts of interest that arise between private and public interests when vested in private individuals. This is a remarkable omission considering that Government has spent the last decade reorganising its own affairs to separate conflicting roles within state institutions, in the interests of "transparency" and "accountability". The paper acknowledges that "in some circumstances" there is a place for retention of Crown responsibility but does not make any commitments to do so, even over areas with high conservation or recreation value. The paper continues—

> *"The maintenance of public interest values does not depend on ownership. They can be provided for both on private land and Crown owned land. The issue is that of the degree to which those values are protected in law, and the degree of control over them which is available to the public".*

The following is a review of the official rhetoric, of the degree of protection under law and control by the public for each of five 'mechanisms' identified by the Director-General of Conservation (letter to PANZ, 22 July 1994) for the protection of 'public interest values' on South Island Crown pastoral leases. The 'mechanisms' identified by the D-G are covenants, protected private land, management agreements, rules in district plans, and easements.

This review concludes that the shortcomings of 'protective' mechanisms over private land, as a way of securing and managing 'the public interest', are so great that these cannot be taken seriously as a substitute for Crown ownership and control.

Mechanism No. 1
Covenants

Definitions

Covenant
"An agreement where a person promises to give, do or not do something for another on their land" (Department of Justice 1991).

Covenant running with the land
"A covenant of which successive owners or lessees of the same land are, as such, entitled to the benefit, or liable to the obligation, Cf. Property Law Act 1952, ss 63-64, 112, 113 (NZ Law Dictionary Third Edition).

Statutory provisions for covenants

Conservation Act 1987 (s 27)
Features of Conservation Act 'conservation covenants' are—

- They are created for 'conservation purposes' which includes public recreation.
- They *shall* be registered against the property title.

Reserves Act 1977 (s 77)
Features of Reserves Act 'conservation covenants' are—

- They are for preservation of natural, historic, or landscape values.
- The Minister must be satisfied that the particular purpose can be achieved without acquiring the ownership of the land, or the lessee's interest in the land, for a reserve.
- Any covenant under this section *may* be in perpetuity or for any specific lesser term.
- Offence provisions of Act apply, with "necessary modifications".
- Every conservation covenant *shall* run with and bind the land and registered against the title.
- There is an implied requirement for conservation covenants to be purchased by the Crown.

Example:
Pisa Range Conservation Covenant under s 77 Reserves Act, over freehold (former pastoral lease), includes provision for the Minister to ("may") change individual conditions of the covenant by mutual agreement with the landowner "should there be any change in circumstances in the future".

QE II Act 1977 (s 22)
Features of 'open space covenants' are—

- They are intended for "the maintenance of open space" on private land and are intended "for the benefit and enjoyment of the people of New Zealand". They are almost always owner initiated.
    - "Open space" means any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value (s 2).
- The covenants do not generally address public access and recreational matters.
- Terms and conditions of open space covenants are as the QE II Trust Board and the land owner or lessee may agree.
- In the case of any leased land the consent of the lessor is required, with inclusion of any conditions that they think necessary.
- Covenants cannot apply over pastoral occupation licences as licensees do not have an interest in the land.
- An open space covenant may be executed to have effect in perpetuity or for a specified term.
- Every open space covenant *shall* run with and bind the land and shall be registered against the title.
- Offence provisions apply for wilful damage etc., to land and property subject to open space covenants.
- The Trust and owner can, by mutual agreement, vary the terms of the covenant at any time (Condition #13 'standard conditions').
- In pastoral lease situations, a 'standard condition' requiring the exclusion of stock from covenanted areas is struck out.
- The Trust, with the prior approval of the Minister of Lands, may revoke a covenant, if it is satisfied that by reason of change in the character of the land or in any other circumstances, the covenant ought to be obsolete, or that the continued existence would impede the reasonable use of the land (Condition #14 'standard conditions').

QE II Act 1977 (s 33 'Public Access')
"Subject to any bylaws made under this Act, and to such other conditions as the Board considers necessary or (in the case of land subject to an open space covenant) as may be provided for or limited by the covenant, the public shall have freedom of entry and access to all Trust land and to all land subject to an open space covenant".

Standard QE II Trust conditions for public access over open space covenants stipulate "prior permission from owner" which is a reversal of the Act's presumption that there is freedom of access unless expressly limited.

Mechanism No. 2
Management Agreements

Conservation Act 1987 (s 29)
Features of 'management agreements' are—

- The Minister may enter into any agreement, contract, or arrangement of any kind with any person on such terms and conditions as the Minister thinks fit.
- The purpose is to carry out "the conservation of any natural or historic resource", which can include public recreation.
- There are no provision or requirement for registering against the title.
- There are no provisions for public participation in preparation of the agreement, or for notification or objection to its terms or revocation.
- There is discretion to spend public monies.

A management agreement would be deemed to be a covenant for the purposes of registration against the title. The provisions of the Property Law Act apply (see 'Constraints on effectiveness of covenants' below).

Mechanism No. 3
Protected Private Land

Reserves Act 1977 (s 76)
This provision allows private land to be protected *as if it were a public reserve*. Features of this provision are—

- A requirement that the owner applies for the land to be declared 'protected private land'. No ability for the Minister to apply.
- Declaration, by notice in the *Gazette*, subject to the terms of any agreement between owner and the Minister. Those terms could be weaker than or contrary to requirements that must apply to public reserves.
- Declaration only applies to protection or natural or historic qualities, not for the purposes of public recreation.
- Land must be "sufficiently fenced or otherwise protected from damage by stock". There is an onus to exclude stock that makes use of 'private protected land' status difficult for large, non-discrete, areas of the pastoral high country.
- Minister may at any time revoke any declaration; no provision for public notification or objection. Insecure as subject to owner pressure and political whim with no public accountability.
- Offence provisions of Act applies, with modifications, as if area were a reserve.
- Agreement may allow the owner or successors the right to do any act or thing forbidden by the Act. Therefore lesser protection than offered by public reservation.
- The Minister's declaration shall be recorded against the title, and be binding on the successors in title, subject to any agreement to the contrary.
- The Minister may, with the owner's consent, manage the area. Public liability for management costs could be as great as if the area were a public reserve. Because of private occupation and use of area, monitoring compliance with the terms of the agreement could entail greater costs to the Crown than a public reserve.
- The Minister may, with the owner's consent, take steps to make the area readily accessible, under proper conditions, to the public. Therefore public access and recreation is at owner's discretion, with conditions that can be highly restrictive. Not comparable to rights of public use of reserves.

In terms of land law an agreement creating protected private land would be deemed to be a covenant for the purposes of registration against the title. The provisions of the Property Law Act apply (see 'Constraints on effectiveness of covenants' below).

Mechanism No. 4
District Plan Rules

The Director-General of Conservation cites district plan rules prepared under the Resource Management Act (RMA) as a means of managing 'public interest' values (nature conservation, public recreation and access) in the high country. This is presumably while under freehold rather than public ownership.

In February 1994 the Commissioner of Crown published a paper on the application of the RMA to the South Island high country (see appendix 5). This identified several matters of national importance in the RMA that are applicable to the protection of 'public interest values', noting that regional and district councils are able to make rules which prohibit, regulate and allow activities. However "the Resource Management Act places certain constraints on the degree of control that a local authority may exercise over land use".

The constraints are that existing use rights are protected if

-the use was lawfully established before the rule became operative or the proposed plan was notified, and
-the effects of the use are the same or similar to those which existed before the rule became operative or the proposed plan was notified.

This...means that there are potentially significant constraints on the action that district councils may take, for example, to protect indigenous vegetation or landscape values from existing uses. ***The controls that are available under the Act apply only to future uses or to changes of use.***

It therefore appears that the effects of *continuing* pastoral grazing on natural values is incapable of being regulated by rules in district plans.

The CCL's paper goes on to consider whether the provisions of the RMA cover nature conservation, landscape, and public access, but failed to address the latter item.

Under (the) RMA, these issues fall within the ambit of district council responsibilities for land use control ("use" explicitly includes any destruction, damage or disturbance to the habitat of plants or animals (Section 9(4)).

Most of these matters relate to "matters of national importance" identified in Section 6 of the Act.

There would appear to be significant "existing use" and/or "reasonable use" constraints on the extent to which district councils can exercise regulatory control over these matters. For example, a council could only constrain the clearance of indigenous vegetation (for reasons of nature or landscape conservation) if the vegetation in question had not already been cut down or if such a constraint did not prevent reasonable use. ***Nature conservation or landscape objectives might need to be pursued through other means, such as heritage orders or direct purchase.***

The paper concluded that the RMA—

> *"places significant constraints on the ability of district councils to control existing uses for the purpose of protecting indigenous vegetation, wildlife habitat and landscape values... Moreover,* ***there would be an opportunity, in any comprehensive tenure reform exercise, to identify high country areas with significant nature conservation and landscape values and to assign these areas to the Conservation Estate or to devise some other form of protection"***.

The RMA is therefore incapable of being used in the manner proposed by the Minister and D-G for nature conservation.

Mechanism No. 5
Easements

Definitions

Easement
"A right enjoyed by a person over his neighbour's property; such as a right of way, or right of passage for water" (NZ Law Dictionary. 3rd Edition 1986. Butterworths, Wellington).

Easement
"A positive easement is a right to use the land of another person in a particular way without any right of possession of the land, or to take any part of the soil or its produce, or to prevent a landowner from using his or her land in a particular way. A negative easement is a right which does prevent a landowner from using his or her land in a particular way; it is distinguishable in essence from a restrictive covenant only by the form of its creation" (Hinde, McMorland and Sim. 1986. Introduction to land law. 2nd edition. Butterworths, Wtn).

Under the Land Transfer Act, (s 90D), on registration of any easement of right of way the following rights are granted (Seventh Schedule), except so far as they are varied or negatived in the easement certificate—

> *"The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee, his servants, tenants, agents, workmen, licensees, and invitees (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times by day and by night to go pass and repass, with or without horses and domestic animals of any kind and with or without carriages, vehicles, motor vehicles, machinery, and implements of any kind, over and along the land over which the right of way is granted or created"*.

Most easements are more restrictive in the rights conveyed than those set out above. Easements created under the Land Act (s 60) may be subject to such conditions, restrictions, and covenants as the Commissioner of Crown Lands (CCL) determines. In the case of easements as rights of way to public lands they are normally confined to foot and/or vehicle use.

While easements create means of creating public access to suit individual situations they do not provide the same security of access as do public roads. They are not necessarily permanent, and can be term easements; on expiration of the term an easement is extinguished.

In contrast public roads provide assured rights of public passage at all times, by all means, and rights of objection and appeal to closures and road 'stopping'.

Power to modify or extinguish easements

During the term they can also be varied, negatived, or added to by agreement between the parties (Land Transfer Act 90E). The public would not be deemed to be an affected party.

The Courts have power to modify or extinguish covenants (section 126G Property Law Act 1952). This can be instigated at any time by the occupier of the land. There are no provisions for public notification or objection.

Property Law Act 1952 (s 126G)

Power for Court to modify or extinguish easements

Features of this section are—

- On application from the occupier of the land a Court can, by order, modify or wholly or partially extinguish an easement upon being satisfied of any *one* of the following—
    - By reason of any change since the creation of the easement in the nature or extent of the use of the land *or* in the character of the neighbourhood *or* in any other circumstances of the case that the Court considers relevant, the easement ought to be modified or wholly or partially extinguished.
    - That the continued existence of the easement would impede the reasonable use of the land in a different manner or to a different extent from that which could have been reasonably foreseen.
    - That every occupier has agreed to the easement being modified or wholly or partially extinguished, or by his or her acts or omissions may reasonably be considered to have abandoned or waived the easement .
    - That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the easement (however the public would not be asked if it is 'injured'!).

Constraints on effectiveness of covenants etc

Lack of political will to enforce

Covenanting authorities have proved to be loath to intervene when covenants are breached, more usually acceding to landowner demands to ignore or amend their terms. The Crown etc, acting beyond the gaze of 'the public', is more likely to 'overlook' or retrospectively approve transgressions, than to instigate a legal remedy. That is the easier and politically expedient course to take.

The Crown and QEII Trust is entitled to enforce the terms of a covenant and to seek damages through the Courts. Rarely, if ever, has the Crown been known to do so. There is a general lack of political will particularly as covenants are seen as 'encumbrances' or impositions upon private property rights.

A reminder of the weakness of legal agreements (in this case created by Court Order) is provided at Mt Hikurangi. Denis Marshall gave 5000 hectares of forest park to Ngati Porou in 1991 with agreement to register covenants against the freehold title to guarantee public access and protection. This was breached by Ngati Porou closing public access in 1992. Despite being legally enforceable, the Government hasn't demonstrated a will to do so or to claim the land back. It is the mechanism of covenants that is most frequently advocated for the South Island high country!

Uncertainty of enforcement, etc.

(Reference: Hinde, McMorland and Sim. 1986. Introduction to land law. 2nd edition. Chapter 1, 'Covenants affecting freehold land'. Butterworths, Wellington)

- Under laws of contract and equity there are different abilities to sue depending on whether breach is of positive or restrictive covenant.
- A successful action may result in payment of damages. This may not result in making good damage to a natural environment, as this may be physically impossible.
- Legal rules are complex and uncertain re standing of subsequent covenantee or covenantor to take action for breach (must be privity of contract or estate).
- There is doubtful ability to increase the burden of a restrictive covenant; the purpose of s 127 Property Law Act is to decrease that burden.
- Courts use narrow rules of law, rather than on public policy to decide what is appropriate in modifying or extinguishing covenants.

Covenants used to resist tenure change

It has been found that QE II Trust covenants entered into over pastoral leases have been used to resist tenure changes proposed by the Crown and consequent avoidance of greater levels of protection or provision for public access. Usually such covenants provide for little more than 'status quo management'. Fencing or exclusion of stock is not required from sensitive environments (eg., wetlands, forests), largely defeating the point of covenanting them.

Lowest order of protection

To enter into covenants requires the consent of everyone with a registered interest in the land, including mortgagors. This may be difficult to obtain. The lowest order of protection may result.

Little or no improvement in public access

Most covenants do not provide for public rights of access. Some provide for access at the discretion of the landowner. This is no advance on the situation applying to private lands in general.

Durability untested

The only substantial body of covenants creating public rights of access and use are on State-owned Enterprise lands. The terms of such are generally vague. Their durability is yet to be tested when SOE lands become privately owned.

Inflexibility

To be enforceable covenants must be explicit and detailed enough to foresee every conceivable loophole and future situation. They should be able to withstand the ingenuity of lawyers acting for a present or future antagonistic landowner. If it were possible to cover everything this would remove the flexibility needed to respond to legitimate future public needs. However changes can only be negotiated with the agreement of the landowner.

Private ownership final

If covenants fail it is most unlikely any future government, except in the most exceptional circumstances, would have both the will and the money to purchase the area, assuming a willing seller.

No security when registered against title

In regard to a s 77 Reserves Act covenant over Mt Hikurangi, the Maori Land Court on 18 January 1991 recorded in its minutes that "encumbrances on the title (are) separate from the (Crown's) legal interest. The legal interest is vested in perpetuity. You (Ngati Porou) are not bound by the terms of those covenants in perpetuity. You are not precluded from changing things by agreement", and, "conditions reserving rights are negotiable in the future. **Conditions may simply represent a gradual process of complete transfer**". The Court continued to record in its minutes of 14 March 1991 that **"if necessary conditions imposed can be removed. DOC has no objections".**

Power to modify or extinguish covenants

The lack of security for the public interest is the central flaw with covenants. The Courts have power to modify or extinguish covenants (section 126G Property Law Act 1952). This can be instigated at any time by the occupier of the land. There are no provisions for public notification or objection.

Property Law Act 1952 (s 126G)

Power for Court to modify or extinguish covenants

Features of this section are—

- On application from the occupier of the land a Court can, by order, modify or wholly or partially extinguish a covenant upon being satisfied of any *one* of the following—
- By reason of any change since the creation of covenant in the nature or extent of the use of the land *or* in the character of the neighbourhood *or* in any other circumstances of the case that the Court considers relevant, the covenant ought to be modified or wholly or partially extinguished.
- That the continued existence of the covenant would impede the reasonable use of the land in a different manner or to a different extent from that which could have been reasonably foreseen.
- That every occupier has agreed to the covenant being modified or wholly or partially extinguished, or by his or her acts or omissions may reasonably be considered to have abandoned or waived the covenant.
- That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the covenant.

Lack of public consultation

The QEII Trust has no history of public consultation with interest groups over the terms of proposed covenants.

As a matter of policy the Crown may consult groups but this is confined to a discretion occasionally exercised. There are no requirements for public consultation.

Private management — public costs

It is implicitly assumed by proponents of private management and ownership of 'public interest values' that the Crown will be saved the cost of managing land. This may not be the case. *If a covenanting relationship is entered into with a private landowner, the costs to the Crown may be the same or higher than under public ownership and management.*

If covenants are used on a large scale, as proposed for the South Island high country, this would require major commitments of DOC staff and other resources for **monitoring compliance with conditions and issuing approvals.** This would probably be needed to an extent greater than if the land was under public ownership. Private occupiers are likely to be undertaking other activities that may conflict with the terms of the covenant (eg. grazing, burning, commercial recreation). A large number of covenants may necessitate a full-time DOC presence to police.

Currently the QE II Trust has almost no ability to effectively monitor covenants it has negotiated over pastoral leases.

Covenants can make provision for the Crown—

- To pay **rates** on behalf of the owner. (eg. Mt Hikurangi). Under Crown ownership there is no liability to pay rates.
- To accept Crown liability for **control of wild animals** and other animal pests and the eradication and control of **weeds** (eg. Mt Hikurangi).
- To assist with **wildfire suppression** at no cost to owner (eg. Mt Hikurangi).
- To share boundary **fencing costs** (eg. Mt Hikurangi). If a state area the Crown is not bound by the provisions of the Fencing Act.
- To **forgo revenue** collected by payment of nett income to the landowner from any commercial or recreational hunting (eg. Mt Hikurangi).
- To provide **public information and interpretation services** (eg. Pisa Range covenant).
- To be consulted and approve **management/development plans** (eg. Pisa Range covenant).
- To provide **technical advice or assistance** to the landowner (eg. Pisa Range covenant).
- To meet any liability for costs or assistance to the landowner as the Minister thinks fit.

From the foregoing it can be concluded that rather than save the government money, covenants can cost at least as much and possibly more than direct ownership and management by the Crown. The costs can be regarded as subsidies to the private sector for management of a privately-owned outdoors. It would be more economical for the Crown to manage this itself.

Because covenants create enforceable legal obligations on the Crown they are likely to become number one priority for DOC, drawing scarce funds away from essential management of public lands and the provision of public services. Conceivably this could cause reduced public services and protection for public lands. Paralleling what is happening in other areas of state services, the resultant public dissatisfaction with DOC's performance could then be used by Government as justification for privatisation of the public estate.

Why is public ownership necessary?

Notions of universal private property rights are currently in vogue within government. In relation to land the basic premise is that the state has no useful or beneficial role in management—private market forces and 'market instruments' are better able to identify needs, remedies, and opportunities for investment and, somehow, satisfy social goals. The 'trickle-down' theory is that if private interests benefit then the rest of the community also benefit. In relation to natural lands with value for public use and enjoyment such notions are a complete fallacy as even the most cursory reflection on human behaviour and history shows—

Conflicts of interest

Inherent conflicts of interest exist between the self-advancement aspirations of individuals, and the community purposes of areas held as public reserves. These areas are primarily spiritual, recreational and natural places, not manageable solely in dollar terms, or for private benefit.

Exceedingly few groups or vested interests are successful at self regulation, particularly for purposes of little or adverse benefit to themselves. Direct state policing and regulation is still very necessary to serve community purposes.

Transparency

Through hard-won and often bitter experience most human societies structure themselves so as to vest separate and potentially conflicting powers and privileges in separate institutions or people. That is why there must continue, as far as practicable, to be clear distinctions between public and private lands and interests.

Capricious private control

The availability of natural and recreational areas for public use has to be beyond the fickle or capricious control of private individuals who may ration or exclude segments of public use under a variety of pretexts. This is the basic rationale behind Queen Victoria's 'Queen's Chain' and reserves instructions to Governor Hobson in 1840. There is a timeless wisdom to not allowing public resources to be occupied or owned for private purposes.

Political accountability

Community ownership and public management of a natural resource, in a democratic society, requires direct political accountability for its administration. This is a slow and cumbersome process. This provides the best assurance of protection from exploitation of either the natural resource or the public wishing to use and enjoy it.

Flexibility

Public ownership, without property rights being conveyed to vested interests, allows maximum flexibility to amend resource management to adapt to changing ecological, social, and recreational needs. This is within the objectives set by legislation. If there is a pressing enough need to change the rules/law this is by public process with checks and balances built in. Conversely if the terms of a covenant needs changing in the public interest, this can occur only with the agreement of the land owner.

Practice vs knowledge

In use of land by propertied interests there is often a major gulf between land occupiers' behaviour or practices and their knowledge or awareness of conservation techniques and public needs. Short term imperatives, often dictated by financiers, usually prevail.

Summary of provisions for public management

Reserves Act 1977

This is the longest-standing statute governing the protection and management of public lands. It dates from the first ordinances passed by colonial government, and is the result of a succession of 'reserves' Acts and amendments since then. It embodies the most comprehensive set of management objectives, duties and restraints on administering authorities for public lands in New Zealand. It has comprehensive public notification, submission and objection procedures relating to the preparation of management plans, changes to classification or purpose of reserves, and to revocation of reserve status.

Administering authorities, including DOC, have a statutory duty to administer reserves in accordance with the provisions of the Act "so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purposes for which it is classified".

National Parks Act 1980

These are governed by a statutory principle that they are to be maintained in a natural state, and the public to have a right of entry (s 4). National park status cannot be revoked except by Act of Parliament.

There are procedures for preparing and reviewing management plans, requiring public notification and submission.

Conservation Act 1987

The Minister is required to establish management plans for every conservation area, subject to public notification and submission procedures, and to manage areas in accordance with plans. Public notification and objection procedures apply to disposals of conservation areas.

Discussion

Unlike private activities on private lands, official and Ministerial conduct can be discovered by use of the Official Information Act.

Actions inconsistent with the provisions of the above statutes are ultimately reviewable through the Courts. However the usual remedies for aggrieved members of the public arise from complaints to the Ombudsman, representations to the Minister, administering authorities and MPs, and by public airing of the grievance. Political remedies are within the grasp of anyone with the knowledge, will and interest to use them. They do not depend on substantial financial resources that legal (Court) actions require. These Acts provide models of popular democracy at work, with the trustees of these lands publicly accountable for their acts and omissions.

Conclusion

None of the 'private conservation management' mechanisms reviewed can begin to match the security, accountability, and public remedies afforded by the Reserves, National Parks, and Conservation Acts over natural and recreational lands.

Appendices

Appendix 1

Reserves Act 1977

Section 76. Protected Private Land 76. Declaration of protected private land— (1) The owner of any private land or the lessee of any Crown land may at any time apply to the Minister for his land or any part thereof to be declared to be protected private land under and subject to the terms of any agreement entered into between the owner or lessee and the Minister.

(2) The Minister, if satisfied that the land possesses such qualities of natural, scientific, scenic, historic, cultural, archaeological, geological, or other interest that its protection is desirable in the public interest, or that rare species of indigenous flora or fauna are on the land, and the preservation of such flora and fauna is in the public interest, and that the land is sufficiently fenced or is otherwise protected from damage by stock, may, by notice in the *Gazette* declare the land to be protected private land for nature, scenic, historic, or scientific purposes, having regard to the provisions of sections 18 to 21 of this Act relating to the classification of historic, scenic, nature, and scientific reserves, and may in like manner revoke any such declaration.

(3) While that declaration remains in force, sections 93 to 105 of this Act shall, as far as they are applicable, and with the necessary modifications, apply to the protected private land in all respects as if it were a nature, scenic, historic, or scientific reserve, as the case may be, notwithstanding that the land comprised therein or, as the case may be, the interest of the lessee or licensee may be sold or otherwise disposed of:

Provided that in their application to any protected private land sections 93 to 105 of this Act shall be read subject to any agreement between the owner or lessee of the land and the Minister reserving to the owner or lessee or his successors in title the right to do any act or thing forbidden by this Act.

(4) Unless the agreement between the Minister and the owner or lessee or licensee of the land specifically provides otherwise, the agreement shall, when the notice under subsection (2) of this section has been recorded against the title, be binding on the successors in title of that owner or lessee.

(5) Where an agreement under this section applies to land comprising part of the land in a certificate or instrument of title, the District Land Registrar may require the deposit of a plan in accordance with section 167 of the Land Transfer Act

(6) The District Land Registrar, on the application of the Commissioner, shall enter in the appropriate folium or the register relating to the land that is declared to be protected private land a notification thereof.

(7) The Minister may, with the consent of the owner or lessee, as the case may be, from time to time take such steps as he thinks necessary or desirable for the management and preservation of any protected private land, and cause such steps to be taken as in the Minister's opinion are necessary to make it readily accessible, under proper conditions, to the public.

Cf. 1953. No. 69, ss. 58, 65 68; 1966. No. 26, s. 3

Section 77. Conservation covenants— (1) The Minister, any local authority, or any other body approved by the Minister if satisfied that any private land or any Crown land held under Crown lease should be managed so as to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value, and that the particular purpose or purposes can be achieved without acquiring the ownership of the land, or, as the case may be, of the lessee's interest in the land, for a reserve, may treat and agree with the owner or lessee for a covenant to provide for the management of that land in a manner that will achieve the particular purpose or purposes of conservation:

Provided that in the case of a Crown lease the consent of the Minister or the Minister of Conservation, as the case may be, shall be required, and that Minister may give consent subject to the inclusion of any condition in the covenant or conditions, and may agree to a reduction in rent if, having regard to the basis for fixing the rent, it appears fair and equitable to do so.

(2) Any covenant under this section may be in perpetuity or for any specific term.

(3) While any conservation covenant under this section remains in force, sections 93 to 105 of this Act, as far as they are applicable and with the necessary modifications, shall apply to the land affected thereby in all respects as if it were a reserve, notwithstanding that the land or the interest of the lessee may be sold or otherwise disposed of:

Provided that in their application to any such land or interest sections 93 to 105 of this Act shall be read subject to the terms and conditions set out in the conservation covenant.

(4) Notwithstanding any rule of law or equity to the contrary, every conservation covenant shall run with and bind the land which is subject to the burden of the covenant, and shall be deemed an interest in the land for the purposes of the Land Transfer Act 1952. The District Land Registrar, on the application of the Commissioner in the case of an agreement to which the Minister is a party and of the local authority in the ease of an agreement to which a local authority is a party, shall enter in the appropriate folium of the register relating to the land that is subject to the burden of the covenant a notification thereof.

(5) Where the burden of the covenant under this section applies to land comprising part of the land in a certificate or instrument of title, the District Land Registrar require the deposit of a plan in accordance with section 167 of the Land Transfer Act 1952.

Subject to sections 78, 82, 83, 84, 89, 95, 105, and 110 of this Act, the purchase price of any conservation covenant to which the Minister is a party shall be paid out of money appropriated by Parliament.

(7) The purchase price of any conservation covenant to which a local authority is a party may be paid by the local authority out of its general fund or account or out of a separate account kept for the purchase of land to be held as public reserves, or may be apportioned by the local authority between that fund or account and that separate account.

Appendix 2

Conservation Act 1987

Section 27. Covenants—(1) Notwithstanding any enactment or rule of law,—

(a) There may be granted or reserved over any land any covenant for conservation purposes in favour of the Minister; and

(b) Every such covenant shall run with and bind the land that is subject to the burden of the covenant, and shall be deemed to be an interest in the land for the purposes of the Land Transfer Act 1952.

(2) Where a covenant is granted or reserved under this section, the District Land Registrar of the land registration district affected, on the application of the Director-General, shall, without fee, enter on the appropriate registers a notification that the land affected by the covenant is subject to the burden of the covenant.

Section 29. Management agreements—The Minister may enter into any agreement, contract, or arrangement of any kind with any person on such terms and conditions as the Minister thinks fit, for the Minister, or the person on the Minister's behalf, to carry out the conservation of any natural or historic resource on or in any land owned or under the control of the person.

Section 2. Interpretation.

"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.

Appendix 3

Property Law Act 1952

Section 126G. Power for Court to modify or extinguish easements and covenants—(1) Where land is subject to an easement or a positive covenant or a restrictive covenant, a Court may from time to time, on the application of the occupier of the land, by order, modify or wholly or partially extinguish the easement or covenant upon being satisfied—

(a) That, by reason of any change since the creation of the easement or covenant—

(i) In the nature or extent of the user of the land to which the benefit of the easement or covenant is annexed or of the user of the land subject to the easement or covenant; or

(ii)In the character of the neighbourhood; or

(iii) In any other circumstances of the case that the Court considers relevant—

the easement or covenant ought to be modified or wholly or partially extinguished; or

(b) That the continued existence of the easement or covenant in its present form would impede the reasonable user of the land subject to the easement or covenant in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time of the creation of the easement or covenants; or

(c) That every occupier of full age and capacity of the land to which the benefit of the easement or covenant is annexed has agreed to the easement or covenant being modified or wholly or partially extinguished, or by his or her acts or omissions may reasonably be considered to have abandoned or waived the easement or covenant wholly or in parts; or

(d) That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the easement or covenant.

(2) Without limiting subsection (1) of this section, on an application under that subsection in relation to an easement of vehicular right of way, a Court may make an order modifying or excluding the operation of any of the provisions of the Ninth Schedule to this Act.

(3) Where any proceedings are instituted to enforce an easement or a positive covenant or a restrictive covenant, or to enforce any rights arising out of a breach of any such covenant, any person against whom the proceedings are instituted may, in those proceedings, apply to the Court for an order under this section.

(4) Notice of any application made under this section shall, if the Court so directs, be given to the territorial authority (within the meaning of the Local Government Act 1974) of the district in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the Court may direct.

(5) An order under this section shall, when registered in accordance with the succeeding provisions of this section, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the benefit of the easement or covenant, and whether or not those persons are parties to the proceedings or have been served with notice.

(6) In the case of land under the Land Transfer Act 1952, the District Land Registrar may of his or her own motion, and on the application of any person interested in the land shall, make all necessary amendments and entries in the register book for giving effect to the order in respect of all grants, certificates of title, and other instruments affected thereby and the duplicates thereof, if and when available.

(7) In the case of other land, a memorandum of the order shall be endorsed on such of the instruments of title as the Court directs.

Appendix 4

Queen Elizabeth the Second National Trust Act 1977

Section 2. Interpretation—In this Act, unless the context otherwise requires,—

"Open space" means any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value:

Section 22. Open space covenants—(1) Where the Board is satisfied that any private land, or land held under Crown lease, ought to be established or maintained as open space, and that such purpose can be achieved without the Trust acquiring the ownership of the land or, as the case may be, the lessee's interest in the land, the Board may treat and agree with the owner or lessee of the land for the execution by the owner or lessee in favour of the Trust of an open space covenant on such terms and conditions as the Board and the owner or lessee may agree.

(2) In the case of any private land, where the person with whom the Board is treating is an owner by virtue of being a lessee of the land, the consent of the lessor (and, if the land is Maori land, of the Registrar of the Maori Land Court) shall be required to the execution of the covenant, and any such consent may be given subject to the inclusion in the open space covenant of any conditions that the person giving his consent thinks necessary.

(3) In the case of a Crown lease, the consent of the person or authority charged with the administration of the land shall be required to the execution of a covenant; and that person or authority may consent subject to the inclusion of any conditions in the open space covenant, and may agree to a reduction in the rent if, having regard to the basis for fixing the rent, it appears fair and equitable to do so.

(4) The effect of an open space covenant shall be to require the land to which it applies to be maintained as open space in accordance with the terms of the covenant and, subject always to those terms, in accordance with the other provisions of this Act relating to land to which open space covenants apply.

(5) An open space covenant may be executed to have effect in perpetuity or for a specified term, according to the nature of the interest in land to which it applies and the terms and conditions of the agreement between the Trust and the owner.

(6) Notwithstanding any rule of law or equity to the contrary, every open space covenant shall run with and bind the land that is subject to the burden of the covenant, and shall be deemed to be an interest in the land for the purposes of the Land Transfer Act 1952.

(7) The District Land Registrar for the land registration district in which the land is situated shall on the application of the Board enter in the appropriate folium of the register relating to the land that is subject to the burden of the covenant a notification of the covenant.

(8) Where the burden of the covenant applies to land comprising part of the land in a certificate or instrument of title, the District Land Registrar may require the deposit of a plan in accordance with section 167 of the Land Transfer Act 1952.

Section 33. Public access—Subject to any bylaws made under this Act, and to such other conditions as the Board considers necessary or (in the case of land subject to an open space covenant) as may be provided for or limited by the covenant, the public shall have freedom of entry and access to all Trust land and to all land subject to an open space covenant.

Appendix 5

The Application of the Resource Management Act 1991 to the South Island High Country

Appendix 4 to—
'The Tenure of Crown Pastoral Land: The issues and options.
Commissioner of Crown Lands, Wellington. February 1994.

The Resource Management Act 1991 has a single purpose — to promote the sustainable management of natural and physical resources, including land, water, air, soil and all forms of plants and animals.

Sustainable management is defined as

> *Managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while*
>
> > *(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations [; and]*
> >
> > *(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
> >
> > *(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.*

Section 6 of the Act identifies a number of "matters of national significance" which all persons exercising functions under the Act are to "recognise and provide for" in achieving the purpose of the Act. The following matters are of particular significance to land currently covered by pastoral leases:

(a) The preservation of the natural character of wetlands lakes and rivers and their margins and the protection of them from inappropriate subdivision, use and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) The maintenance of public access to and along the coastal marine area, lakes and rivers:

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga.

In order to achieve the purpose of the Act, to carry out their functions and achieve the objectives of their plans...regional and district councils are able to make rules which prohibit, regulate and allow activities. In making a rule, councils are required to have regard to the actual or potential effects on the environment of activities, including, in particular, any adverse effect (Sections 68, 76). Rules may specify:

Permitted activities:
where the Act or plan states that no consent is required.

Controlled activities:
where there is an entitlement to the granting of the consent: subject to the consideration of conditions specified in the plan.

Discretionary activities:
where the plan specifies that consent is required subject to the full discretion of the council exercised in accordance with the criteria in the plan.

Non-complying activities:
where an activity contravenes a plan but is not prohibited.

Prohibited activities:
an activity the plan expressly prohibits and for which no consent may be sought.

A significant difference between the Resource Management Act and the previous Town and Country Planning Act regime is that people can use land in any way unless a rule in a regional or district plan says otherwise (Section 59).

The Resource Management Act places certain constraints on the degree of control that a local authority may exercise over land use. They are aimed at protecting private property rights and ensuring that any controls are both necessary and cost-effective. These constraints are as follows:

• *Existing use rights protected*

Section 10 of the Act provides that land may be used in a manner that contravenes a rule in a district plan or a proposed district plan if:

—the use was lawfully established before the rule became operative or the proposed plan was notified, and

—the effects of the use are the same or similar to those which existed before the rule became operative or the proposed plan was notified.

This provision represents a carry-over of the extensive existing use rights which existed under the Town and Country Planning Act and means that there are potentially significant constraints on the action that district councils may take, for example, to protect indigenous vegetation or landscape values from existing uses [see (f) below]. The controls that are available under the Act apply only to future uses or to changes of use.

Under Section 20 of the Act, which relates to the control of existing activities affecting common property resources, such as soil and water, regional councils have a much stronger ability (than have district councils in relation to their functions) to impose controls aimed at restricting existing land uses.

• *Rules cannot render land incapable of reasonable use*

Section 85 of the Act puts a limit on the extent of control that can be exercised. If a provision, or a proposed provision, of a plan renders land "incapable of reasonable use", any person with an interest in the land can apply to have the plan changed. The Planning Tribunal may direct the local authority to change the plan if it considers that the provision would place an unfair and unreasonable burden on any person having an interest in the land.

• *Duty to consider alternatives, assess benefits and costs*

Before adopting any rule, councils are required to satisfy themselves that it is necessary, that the costs are not likely to outweigh the benefits and that it is likely to be the most effective and efficient means of exercising the function (Section 32).

It is important to consider whether or not the provisions of the Resource Management Act 1991 or other legislation cover the provisions of the existing Land Act covenants. Each of these covenants is now examined from this point of view.

(a) The burning of tussock

This is currently subject to the consent of the Commissioner of Crown Lands, subject to any conditions that he may deem necessary (Section 106 (l) of the Land Act).

Under the RMA, regional councils are able to deal with burning in terms of their obligation to prepare objectives and policies relating to regionally significant effects of the use, development or protection of land (Section 30 (l) (b)). More specifically, they are able to deal with burning by way of rules aimed at controlling adverse effects on soil and water values (Section 30 (l) (c)).

District councils are able to control burning in terms of its effects on other values, such as nature conservation and landscape values (Section 31).

There is potential for developing a fully integrated approach to the control of burning via Section 33 of the Act which enables territorial authorities to transfer specified powers to the regional council. This would allow regional councils to consider and control the effects of burning in their entirety. Restrictions on burning and post-burning management require an integrated approach.

Some regional councils are currently developing proposals for the identification of burn-free areas and other areas requiring permits for burning.

(b) Pest Control

Under Section 99 of the Land Act the lessee is required to keep the land free from vermin, including rabbits.

Under the Biosecurities Act 1993, which came into effect on 1 October 1993, regional councils are responsible for the preparation of regional pest strategies (for animal pests and noxious plants control) in much the same way that regional plans are developed under the RMA. Councils will be responsible for setting policies and implementing control programmes for "declared" pests in their regions.

(c) Disturbance of the soil

Section 108 of the Land Act 1948 requires the lessee to obtain the consent of the Commissioner of Crown Lands for the cultivation, cropping and grassing of pastoral land. There is also an implied covenant for the construction of dams, roads and tracks arising from the fact that a lessee does not have a right to the soil.

Under the RMA, a regional council is able to control the use of any land, including vegetation clearance, in the interest of soil conservation or water quality management. "Use" includes any disturbance of the land (Section (9) (4) (b)).

(d) Overgrazing

Under Section 66(3) of the Land Act, the Commissioner of Crown Lands may restrict stock numbers although his ability to exercise control over grazing is diminished by the fact that the Land Act does not permit any "block" limitations (ie limits on stock numbers in a particular block within the lease) and because registered leases specify a base stock limit below which the Commissioner of Crown Lands can not require stock numbers to be reduced.

There appears to be nothing preventing a regional council exercising control on stocking levels in the interests of maintaining vegetative cover and hence the prevention of soil erosion. However, there may be political constraints on the willingness of councils to do this.

Regional councils are able to exercise control over the management of riparian strip vegetation in the interests of maintaining water quality.

(e) Commercial afforestation

Under Section 108 (1A) (b) of the Land Act 1948, the consent of the Commissioner of Crown Lands is required if the lessee wishes to afforest any part of the lease for the purpose of growing trees for sale.

Under the RMA, regional councils can develop policies, rules and performance standards to protect soil and water values (see disturbance of soils above). District councils can exercise controls on planning and management to protect landscape, natural features, significant vegetation or habitat of indigenous fauna.

(f) Nature conservation, landscape, historical, public access and cultural considerations.

With the exception of Section 167—the setting aside of reserves, the Land Act is silent on these matters. However, under Section 108 of the Land Act, the consent of the Commissioner of Crown Lands is required if the lessee wishes to clear any bush or scrub.

Under RMA, these issues fall within the ambit of district council responsibilities for land use control ("use" explicitly includes any destruction, damage or disturbance to the habitat of plants or animals (Section 9(4).

Most of these matters relate to "matters of national importance" identified in Section 6 of the Act.

There would appear to be significant "existing use" and/or "reasonable use" constraints on the extent to which district councils can exercise regulatory control over these matters. For example, a council could only constrain the clearance of indigenous vegetation (for reasons of nature or landscape conservation) if the vegetation in question had not already been cut down or if such a constraint did not prevent reasonable use (see above). Nature conservation or landscape objectives might need to be pursued through other means, such as heritage orders or direct purchase.

(g) Good husbandry

The requirement for lessees to farm the land "diligently" and in a "husbandlike" manner [Section 99 (9)] of the Land Act 1948) is covered by the general duty of every person, under the RMA, to avoid, remedy or mitigate any adverse effect on the environment arising from an activity carried out by or on behalf of that person (Section 17).

Conclusion

It can be concluded, from the above, that the covenants of the Land Act 1948 relating to the control of land use activities on pastoral leases are covered by the provisions of the Resource Management Act and other legislation.

The RMA places significant constraints on the ability of district councils to control existing uses for the purpose of protecting indigenous vegetation, wildlife habitat and landscape values but such constraints are not particular to the high country. Moreover, there would be an opportunity, in any comprehensive tenure reform exercise, to identify high country areas with significant nature conservation and landscape values and to assign these areas to the Conservation Estate or to devise some other form of protection.

Regional councils can exercise control over vegetation clearance and/or grazing levels in the interests of soil and water conservation.