



Office of the

STATE SERVICES COMMISSION

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Chief Commissioner

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Memorandum for Cabinet State Owned Enterprises Committee

MARGINAL STRIPS : PROBLEMS AND OPTIONS

1 At its meeting of/9 March 1988 the Cabinet State Owned Enterprises Committee:

"(a) directed the State Services Commission to re-convene the group of officials involved in the preparation of the submission under SOE (88) 20 in order to produce a revised and updated submission setting out and clearly identifying the views and recommendations of all interested parties, including those of State-owned enterprises and Parliamentary Counsel;

"(b) invited the Associate Minister for the Environment to arrange further discussions on this matter between the Associate Minister of Conservation, the Associate Minister for State Owned Enterprises and himself."

2 Officials contacted all SOEs and have met with the interested SOEs and other interested parties as directed. These were:

- (a) Railways Corporation;
- (b) Airways Corporation;
- (c) Electricorp;
- (d) Coalcorp;
- (e) Landcorp;
- (f) Forestcorp;
- (g) Parliamentary Counsel;
- (h) Federated Farmers.

The Convenor also met with the Director, National Executive of Acclimatisation Societies and a letter was received from the Federated Mountain Clubs.

3 On 4 May 1988 the Convenor of the Officials' Committee met with the Associate Minister for the Environment, the Associate Minister of Conservation and the Associate Minister for State Owned Enterprises to discuss officials' progress. As a result officials were asked to list all the options available to Ministers, with their pros and cons, noting the support for each option and where possible, its cost. The Associate Ministers indicated support for the option which retains marginal strips in Crown ownership, but allows them to be waived or interest granted.

Background

4 Definition

The term "marginal strip" is used in this paper to mean those strips of land reserved from sale or otherwise set aside under section 58 of the Land Act 1948, section 24 of the Conservation Act 1987, or section 289 of the Local Government Act 1974. These strips are sometimes colloquially referred to as "The Queen's Chain".

5 The precise definition of strips, whether or not they are created in any given case, their width and their purpose, varies with the provisions of each Act. Essentially, they are strips of land along the coast, around the margins of lakes larger than 8 hectares, and along the banks of rivers and streams having an average width greater than 3 metres, which are retained in public ownership (section 58 Land Act) or are brought into public ownership (section 289 Local Government Act) or are brought under public management and control (section 24 Conservation Act).

6 Strips have a different status depending on which Act applies. Section 58 Land Act applies only to Crown Land subject to that Act (but not to any other Lands of the Crown), and strips are created, and remain Crown Land, when adjacent Crown Land is disposed of. Strips created under section 289 Local Government Act are vested in local authorities as local purpose reserves under the Reserves Act 1977. Strips created under section 24 Conservation Act are managed and controlled by the Department of Conservation as land held for conservation purposes, although SOE's may own the land.

Objectives

7 The legislation seeks to achieve two major objectives although the emphasis given to each varies according to which Act applies. The objectives are:

- (a) to provide permanent public access for recreational purposes to the coast, lakes and rivers, that is, to water; and

- (b) to provide for the conservation of the natural and historical values of the strips and of the adjacent water.

Section 58 of the Land Act makes no reference to the conservation objective, and the provision of public access appears to be the overriding concern of the section (and of equivalent provisions in predecessor legislation). Section 289 of the Local Government Act is more explicit, stating that strips are to be set aside, "for the purpose of providing access to the sea, lake, river or stream, as the case may be, and to protect the environment ...". The Conservation Act also explicitly recognises both objectives, but places greater weight on conservation/concerns, and makes the provision of public access subject to those concerns. [It should be noted that Electricorp sees a third reason for the existence of marginal strips; that is, public safety especially with regard to flood control. Public safety issues affect other SOEs and are dealt with later.]

Comment

8 While existing legislative provisions differ in terms of the weight given to the two objectives, this does not in itself justify the inconsistency and complexity of implementation arising from these provisions. Crown ownership of marginal strips should, it is suggested, be seen as only one mechanism amongst a range available to the Crown to meet these, or possibly other, objectives. The objectives are accepted as given and this assumption underlies this paper. The paper also assumes that DOC will own the land held in marginal strips and section 58 strips. This paper therefore attempts to meet three ends:

- (a) it examines the strengths and limitations of existing legislation as a mechanism for achieving the stated objectives;
- (b) it identifies and suggests ways to remove the inconsistent, and non-neutral aspects of existing policy;
- (c) it explores other possible approaches to the achievement of those objectives attributed to marginal strips.

The Existing Policy

9 The basic rationale for marginal strips policy seems to rest on the views that:

- (a) strips of land adjacent to water are likely to have greater value in terms of the objectives of providing public access to water, and/or of conservation than do other general categories of land to which similar specific legislative provisions do not apply; and

- (b) that retention in public ownership is an effective means of ensuring these objectives are met.

10 The provisions are inclusive in nature. That is, there is an assumption that land meeting the criteria set out in the Acts merits special protection. Unless it can be shown (in terms of the grounds for exemption provided in the Acts), that in a particular case this is not so, or that retention of the strip in public ownership is not necessary for the objective to be met, then the land automatically acquires marginal strip status.

Characteristics of Existing Policy

11 Until the Conservation Act was passed in March 1987, section 58 of the Land Act was the most applied provision which required the retention in Crown hands of marginal strips. As stated above, the purpose of this section (and of similar sections in legislation which predated the Land Act) is the provision of permanent public access to the sea, lakes and rivers. In itself, however, the section does not actually achieve this in either a legal sense, or in many cases, in a practical sense.

12 Section 58 strips are Crown Land reserved from sale, but access to or along those strips is not an automatic public right. Legal rights of access to strips are dependent on adjacent land being classified as, for example, reserve land or land classified as National or Forest Parks. Generally such classifications are made over a wider land area with no distinction made between land adjacent to water (the strips) and other land. In practice, virtually unrestricted access to strips, whether or not they are incorporated into reserves or parks, has been allowed over adjacent Crown Land except in exceptional circumstances, such as times of high fire risk. Adjoining land owners have no right to exclude people from strips, and where one of their fences crosses a strip they may be required to install a gate or stile to facilitate public access along the strip; but they are not obliged to permit access to strips.

13 Practical reasons why strips may not provide access to the sea; lakes and rivers are less easily overcome. The slope or other physical features of land set aside as a strip may make a strip impassable. Access to the water may in fact be more practical via a route not directly adjacent to the water. It is also possible for strips to be set aside within an area to which there is no practical means of access. The strip itself may be passable, but access to it is not possible.

14 In all three Acts marginal strips provisions apply only to those rivers and streams not less than 3 metres in average width. Two main concerns have been noted in this regard. Firstly, there has been some uncertainty as to how "average width" should be determined. It is now established practice,

however, for average width to be determined by an inspection of the river or stream over a reasonable length and for the width to be based upon that area covered by normal freshets. 'Normal freshets' are defined as the normal amount of water flowing in ordinary rainy seasons. That is, neither flood nor drought conditions apply. Secondly, it has been argued that width alone is not a good indicator of the value of a river or stream, especially in terms of its conservation value. Some small streams which are claimed to have very high value in conservation terms are therefore not afforded the protection that marginal strips might provide. While the Department of Conservation is not precluded from negotiating directly with landowners for purchase of land or access rights in such cases, success depends on the landowner involved and the amount of resources DoC can devote to the negotiations.

15 It has been pointed out that in the current definition of marginal strips around lakes whose level is subject to intentional alteration, the "maximum control level" is used. It is not quite clear what is intended here. If the "maximum control level" is equated with the "maximum normal operating level" then the lower part of the marginal strip is likely to be subject to flooding. Electricorp has stated that it would seek indemnity from liability for damage if such flooding occurs. This is especially likely if the extent of the danger of flooding is not realised and inappropriate use and development of the strip is allowed.

16 However, if "maximum control level" is equated with "maximum flood level" then this would place marginal strips above such problems. The "maximum flood level" is the 500 year flood level and is consistently referred to in water rights granted for hydro lakes. A 500 year flood is a measure of statistical probability (that is, there is a one in five hundred chance of such a flood occurring each year) and the frequency can be exceeded because of the control of floods in hydro systems. Use of this definition, however, may place marginal strips so far from the water's edge in normal circumstances that the strip cannot facilitate access to the lakes.

17 Problems also arise in defining the boundaries of a strip. Once surveyed, boundaries of marginal strips are not moveable on the land boundary but are considered movable on the riparian (or river bank) boundary. This provides some flexibility for changes in river width or minor changes in the coast line or in the course of a river. However avulsion may leave a strip high and dry away from the river or sea and erosion may leave a strip under the water. In either event the strips will be useless for their original purpose.

18 The Conservation Act has one limitation which the Land and Local Government Acts do not have. While 20 metres is the normal width of a strip under all three Acts and three metres the minimum (except where full exemption is allowed), the latter two Acts state that the strip will be not less than 20

metres wide. Substantially wider areas can and have been laid off although under the Local Government Act it is the subdivider, not the local authority concerned, who has this discretion. The Conservation Act only requires strips of up to 20 metres. There is no explicit mechanism for wider strips to be retained where, for example, there is high conservation value in land extending beyond the 20 metre boundary.

19 All three Acts have provisions for exemption from requirements to lay off strips. These are both general and specific in nature but differ substantially from one Act to another. General provisions in the Local Government and Land Acts allow for full exemption at Ministerial discretion, although in the case of the Land Act this applies only to strips alongside rivers and streams. All three Acts allow for a reduction, at Ministerial discretion, of the width of any strip to three metres minimum, although in the case of the Conservation Act this is subject to a process of public notification and consultation. Landcorp is of the opinion that the provisions for reduction in the Conservation Act will mean reductions will be hard to achieve. Specific exemptions allowed for range from the very narrow provisions in the Conservation Act relating to land occupied by electricity generation or transmission equipment owned by the Electricity Corporation; to the Local Government Act's more general exemption of land forming part of allotments in excess of four hectares which are to be used for farming purposes. Insofar as the Acts cover different classes of land differing criteria for exemption which reflect those differences should not necessarily be seen as inconsistent.

Marginal Strips and SOEs

20 The formation of nine new State Owned Enterprises on 1 April 1987 represents the largest transfer at any one time of Lands of the Crown. This applies in particular to land transferring to the Land and Forestry Corporations. The situation has been further complicated by the enactment of the Conservation Act shortly before 1 April 1987, which contained new general provisions relating to marginal strips as well as specific provisions relating only to land transferring to the SOEs.

21 The result is a complex and confused legal situation which imposes on the Crown, in its dealings with the SOEs, a number of requirements with regard to marginal strips which are inconsistent with requirements imposed when dealing with other land purchasers and therefore impinge on the policy of commercial neutrality. The problems caused to SOEs by the current marginal strips legislation are discussed in paragraphs 22 to 24 below. The discussions with the SOEs confirmed that no new problems regarding marginal strips have arisen.

Major Problems

22 Officials have identified as the major problem that section 24 (especially section 24(8)) of the Conservation Act is in conflict with Government policy of retaining Crown ownership of marginal strips. The legislation as it currently stands is not workable.

23 Other complications arising from a legal interpretation of the current legislation have recently been brought to officials' attention. That is, it has been suggested (see Annex A) that under the current legislation:

- (a) where section 58 strips currently exist or would be reserved on the transfer of land to an SOE, they remain Crown Land and are prohibited from being transferred to an SOE by section 24(2)(b) State Owned Enterprises Act 1986;
- (b) upon transfer to an SOE of land not subject to section 58 reservation, section 24(8) of the Conservation Act operates to create "marginal strips" on so much of the land so transferred as meets the definition of "marginal strip" in the Conservation Act;
- (c) it is clear from the language of section 24(8) of the Conservation Act that it is the actual vestment in, or transfers to, a State Enterprise which results in the creation of marginal strips by operation of that section. Title to such land as becomes a marginal strip (pursuant to that section) remains vested in the State Enterprise which such land was vested in or transferred to;
- (d) where a section 58 strip is narrower than 20 metres a Conservation Act marginal strip would be created extending from the landward boundary of the section 58 strip up to the 20 metre mark;
- (e) the result is that section 58 strips and Conservation Act marginal strips may co-exist side by side, the former in Crown ownership and the latter owned by the SOE but managed and controlled by DOC;
- (f) DOC would obtain jurisdiction over the section 58 strips only after following the procedures set out in section 62 of the Conservation Act and such jurisdiction would be limited to management of the section 58 strips as if they were "stewardship areas" until those strips were declared to be held for conservation purposes;
- (g) with the further result that there could co-exist side by side two strips each subject to different criteria for their management and control;

- (h) ownership by a State Enterprise of the marginal strip land would, in appropriate cases, give to it and to its successors in title, ownership of the adjoining river and lake beds 'ad medium filum'.

In the interests of consistency, there should be no distinctions between section 58 strips and Conservation Act "marginal strips".

24 The two major problems identified by all SOEs are concerned with the Conservation Act and are that:

- (a) no interest in a marginal strip can be granted; and,
- (b) a marginal strip cannot be disposed of even when it is of no use for conservation purposes or for public access.

It is understood that it is intended to address (a) above in the proposed amendments to the Conservation Act which are currently before the Minister of Conservation for consideration. Removal of these two constraints would go a long way to effecting the Ministers' intention that current uses of the land be able to continue, and to ensuring that costs to the Government could be lessened and that strips no longer contiguous with water could be disposed of.

25 Survey

Survey of the strips also poses problems. These are particularly acute for Landcorp, Forestcorp and Coalcorp and include the significant delay, cost and effort required to survey the strips (which may be of variable width) before the adjoining land can be transferred to SOEs and before title can be given. These problems also occur if the Crown retains lake and river beds.

26 It has been suggested that provided an interest in the strip is given to the adjoining landowner the strips do not have to be surveyed. Legal opinion on this matter is, however, that this is not the case as it is necessary to know the boundaries of the land or it cannot be transferred. Furthermore, it is sometimes wished to grant an interest to a party other than an adjoining landowner, although at present the legislation does not allow for this. In such cases a survey is generally required.

27 One of the side-effects of the necessity to survey is the effect on the asset values of SOEs. Ministers agreed that the land which was to transfer to Landcorp should be valued with no allowance made for the loss of marginal strips. Landcorp has stated that should it consider the impact significant it will exercise its option to renegotiate the settlement should marginal strips be laid off, even if it is granted interest over the strips. Forestcorp noted that the issue of marginal

strips is affecting its valuation and delaying its asset negotiations. The transfer of land to most SOE's is dependent on the resolution of the marginal strips issue.

28 Practical Problems

The establishment of marginal strips has also raised practical problems such as fire, weed and pest control and the effect on inter-agency relationships. While these are likely to be overcome if interest over the strips is granted, there may be strips in which no-one wants an interest. These points were raised by Parliamentary Counsel, but were also mentioned by Landcorp, Forestcorp and Electricorp. It should be noted that section 16(2) of the Conservation Act indicates that the Ministers' intention was that current uses of land to become marginal strips should be able to be continued. That is, that interest in the strips could be granted.

29 This also broaches the problem of fencing off the strips. Landcorp has stated it would not be willing to pay all the fencing costs. However, fencing is a special case. Under the Fencing Act 1978 section 58 strips were exempt from the Acts provisions, as was land taken under section 289 of the Local Government Act. The Conservation Act amended the Fencing Act to exempt marginal strips from the provisions of the Fencing Act but lifted the exemption on section 58 strips. This appears to have been on the assumption that section 58 strips would become marginal strips. Therefore there is a need to amend the Fencing Act to reinstate the exemption for section 58 strips in case they are not made marginal strips. The amendment is needed to restore competitive neutrality with all other landowners

30 Administrative Problems

Another problem highlighted by Parliamentary Counsel is that marginal strips have the potential to cause administrative problems for DoC. Marginal strips require a specific statutory management regime, including full management plans as set out in sections 10 and 11 of the Conservation Act, even when adjacent land is also conservation area. Officials suggest that it would be more practical to put forward a national policy statement on the management of all strips and, where DoC considers it necessary, deal with individual strips on a district basis.

31 Other Lands of the Crown

Electricorp has raised the question of other lands of the Crown being made subject to marginal strips. This arose as most Electricorp land is not Crown land or State Forest land (the only two categories of land going to SOEs from which marginal strips are taken) but Public Works land. Electricorp is of the opinion that marginal strips should be laid off around the lakes and rivers in which they have an interest for reasons of public safety and erosion control as well as reasons of public

access and conservation purposes. Electricorp's major concern is with flood control. Coalcorp has also raised the point of public safety, as some opencast mines impinge on marginal strip areas. The Officials' Committee is generally of the view that these issues and the Government's objectives will not be met as it envisaged if the omissions remain and it is not possible to take marginal strips from land owned by the Crown, (as distinct from Crown Land and State Forest Lands) even where it is obvious that there are benefits from doing so. Ministers can resolve this by changing the legislation to include all lands of the Crown or by relying on the current legislation and choosing not to alienate certain lands but declaring them to be conservation areas as per section 7 of the Conservation Act.

Other Issues

32 The options set out below were considered in relation to the following issues:

- (a) the application of the ad medium filum rule. That is, the owner of the river bank of a non-tidal and non-navigable river owns the riverbed to the middle line in the river;
- (b) Government's stated policy (MCC/SOE 13 May 1987) that the beds of rivers and streams with an average width of three metres and greater, and lakes larger than 8 hectares currently in Crown ownership are to remain in Crown ownership, under DoC's control;
- (c) the ability of the Crown to retain such ownership of rivers and their beds even when the river shifts over time;
- (d) that currently only Crown land as defined in the Land Act 1948 and State Forest land, as defined in the Forests Act 1949 immediately before 1 April 1987, is affected by the legislation.

Options for Reform of Policy

33 In considering whether the present legislation provided the best mechanism to achieve the Government's objectives a number of possible options were suggested. These are outlined below and more fully discussed in subsequent paragraphs. The options, ranging from that giving least protection to the marginal strip to that giving the most, are:

A Transfer The Ownership Of All Strips Until Individually Considered:

transfer the ownership of all "marginal strips" adjacent to land transferred to SOEs to the SOEs, on conditions which require their management as if they were marginal strips, until the strips can be considered individually (ten year limit) or until

certificate of title (which necessitates survey) is granted, whichever is soonest; or

B No Automatic Establishment Of Strips:

no automatic establishment of marginal strips except around the coast and identified lakes and rivers, though areas may be explicitly reserved from sale; or

C Resumptive Rights:

automatic establishment of marginal strips around the coast and identified lakes and rivers (though areas may be explicitly reserved from sale) and the transferring of other marginal strips to adjoining SOEs with the requirement that the SOEs manage them as marginal strips. The Crown, through the Minister of Conservation would retain the right to resume the strips if the conditions were abused or if the Crown required ownership. This would be achieved through putting an encumbrance on the title requiring that the areas be managed as marginal strips and stating the reasons for which the land could be resumed. The encumbrance would stay with the title even if the land was on sold. Where land was to be resumed then either:

- (i) compensation would be paid to the SOE (or owner) at that time; or
- (ii) no compensation would be paid as this would have been taken into account at the time of the initial sale;

D Establish Strips In All Cases:

establish marginal strips in all cases and, either:

- (i) have the ability to alienate interests in the strips (including waiving them in clearly defined cases); or
- (ii) be prohibited from disposing of any interest in the strip.

Criteria for Evaluation

34 The above options were all considered against the following broad criteria. That is, how well the option:

- (a) meets the objectives of:
 - (i) public access to water;
 - (ii) preservation of conservation values;

- (iii) ability of the adjoining land owner to continue with present usage;
- (b) will be quickly achievable;
- (c) will not incur unreasonable immediate costs for the Government;
- (d) will not place unreasonable ongoing costs on the Government and DoC as its agent;
- (e) will not require a great deal of Crown interference.

Consideration of Proposed Options

35 In considering the options officials noted that they ranged from option A, which gave all the land to SOEs and then took some back, to option D, which gave all the land to DoC and then gave some to the SOEs. Whichever option is chosen, some legislative changes will be necessary.

Option A - Transfer The Ownership of All Strips Until Individually Considered

36 Officials consider that option A does not adequately meet the objectives as it has all the disadvantages of other options, will require the same length of time and money for survey (that is 10 to 15 years) and will also require statutory provisions for transitional management agreement to ensure the land is managed as marginal strips. This option is favoured by Landcorp above any of the other options put forward. However, Landcorp's first preference is for all Crown land areas to pass to it without any establishment of marginal strips except round the seacoast, round major lakes and along major rivers. Reliance could then be made on the provisions of the Local Government Act as is the case with any other landowner, and on the Corporation's publicly-expressed willingness both to enter into covenants for access or preservation of natural features, or to permit public access as a normal policy. This option is favoured by the Department of Lands.

Option B - No Automatic Establishment of Strips

37 Option B is considered by officials to be the minimum that should be accepted. When considering options, and in discussions with the SOEs, officials became aware that the necessity for marginal strips on the coast, around major lakes and along significant rivers was not opposed. It has been estimated that the survey needs would take five to eight years. However, this option would not guarantee public access to some areas the public now enjoy (despite the clauses permitting public access in the Statements of Corporate Intent of both Landcorp and Forestcorp), nor would it conserve some areas DoC would like preserved. This option would also reduce

DoC's bargaining power, as there would be no areas DoC could use for transfer to landowners when negotiating to better achieve the objectives of marginal strips. This option is not supported

Option C - Resumptive Rights

38 The majority of the Officials' Committee initially favoured option C. Officials differed over whether compensation should or should not be paid on resumption. It has also been suggested that requirements to treat marginal strips as conservation areas would blur the single commercial objective the SOEs' currently have and re-introduce mixed conservation/commercial objectives for them.

39 This option would not be legislatively simple. Current usage of the land would be able to continue and future uses would be possible. The timeframe within which this option could be put in place would be variable. As with option B there would be an initial 5 - 8 years surveying, but after that the survey needs would only be as required for resumptive purposes. It would be necessary to state in the encumbrance that the strip moved with the water. The cost to the Government would be less than for option D as after the initial expenditure, expenditure would be required only when strips were resumed.

40 Officials could not agree whether the Crown should pay compensation if it resumed land for a marginal strip. Treasury were of the opinion that as the sale price for the Landcorp assets was all inclusive, when land was resumed they should be compensated for that loss. Treasury felt that DoC should be funded for this activity. However, DoC was of the opinion that no compensation should be paid and the purchase price of the assets should be adjusted accordingly on the assumption that marginal strips will be required in all cases. This is an unknown quantity of land and it is unlikely Landcorp will regard it as minor. The majority of the Officials Committee reject the option which favours estimating the value of the strips now and providing no compensation on resumption. If it was decided that compensation should be paid, then DoC strongly supports the establishment of a Trust Fund for the specific purpose of resuming marginal strips.

41 One argument in favour of this option is that it encourages flexibility in achieving the objectives of the marginal strip policy. That is, providing access for the public is maintained (and any conservation values observed) whether the access route is on the marginal strip will not be an issue. It therefore has a greater chance of maximising the objectives effectively.

42 Forestcorp favours this option. DoSLI also supports this option as the most practical approach. Crown Law is, however, of the opinion that the option raises so many complications (over title, deciding when abuse has occurred etc) that it

should be rejected. If legislative changes can overcome these problems, then the SSC supports this option as the one meeting the objectives and most quickly, cheaply and easily achieved. The Treasury supports this option if the Crown is not required to own all the lake, river and stream beds currently caught. DOC does not favour this option and the Acclimatisation Societies and the Federated Mountain Clubs do not support it. Their arguments are that the interface between land and water is fragile and its treatment affects both ecosystems. Thus, the margins are areas of high conservation value and should be treated as such.

Option D - Establish Strips In All Cases

43 The last option would require the least number of legislative changes and it would remove the problem of ad medium filium rights except if a strip were waived. Current usage of the land would be able to be continued where interest was granted (as in paragraph 48[b]) and it would also allow for future uses. This option is estimated to double the time and survey costs of option C. There is no way that it will be possible to avoid surveying on the ground a substantial number of the strips as the vegetation cover of much of the land to transfer to Forestcorp would preclude the use of photogrammetric techniques. DoSLI estimates that at least 10 years and possibly up to 15 years will be needed to complete all surveys. Estimates are, however, presently being obtained by DoSLI for Forestcorp with a view to establishing a programme to complete surveys of Forestcorp lands within five to ten years.

44 If this option is adopted the cost to the Government will be high. Landcorp will wish to renegotiate the sale price of the assets and it will not be possible to state exactly how much land will be involved. Forestcorp would want the marginal strips policy to be reflected in the price of its assets, which is still under negotiation. Currently Forestcorp is assessed as paying for the bridges and roads over and along land that will become marginal strips. Forestcorp considers it necessary to its business to control these assets as they provide access to the forests and Forestcorp believes it needs to control such access.

45 Both DoC and Crown Law favour this option. Treasury favours this option if the Government decides to retain in Crown ownership the lake, river and stream beds and the following concerns are met. That is, there is:

- (a) a requirement on the Minister of Conservation to weigh all competing interests, e.g. conservation, public access; against costs to and circumstances of the adjoining land owner.
- (b) a reasonable time period within which the Minister of Conservation shall consider any request (by the adjoining landowner) for alienation.

- (c) a commitment by DoC to attempt to identify during the process of land transfer to SOEs (especially Forestcorp and Landcorp) as many of the unnecessary strips for alienation as possible.
- (d) application of marginal strip policy as at present, i.e., to former Crown land and State Forest land only.

Cost of the Options

46 The Treasury, DoSLI and DoC have all calculated various aspects of the cost of marginal strips. The Treasury has been unable to come up with a definite figure for lost opportunity costs but is of the opinion that for Forestcorp they will be less than 10 percent of the value of the forestry estate. It is suggested by the Ministry for the Environment that this could be between \$10 or \$40 million. The figures for Landcorp are estimated to be less than for Forestcorp. The cost of survey (were all strips to be surveyed) is estimated by DOSLI to be about and probably less than \$6 million.

47 DOC has estimated, using known costs, the following costs. It has been assumed the total length of all marginal strips will be 10,000 kilometres and all strips will be 20 metres wide.

Costs of Management Where the Crown Owns Both Riverbeds and Marginal Strips

Activity	Marginal Strips & River Beds	Marginal Strips Only
	Annual Cost	Annual Cost
	(\$000)	(\$000)
Weed Control (a)	1,000	200
Pest Control (a)	130	26
Fire Control (b)	315	3
Fencing (c)	60	60
Administration (d) and Management Planning	280	200
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Total	<u>\$1,785</u>	<u>\$489</u>

(There will in any case be an initial cost of between \$50,000 and \$150,000 to prepare management plans.)

For Notes see Annex B

Issues Arising from Consideration of the Options and Proposed Legislative Changes

48 It became obvious that whichever solution, even the status quo, that Ministers chose, amendments would be required to the Conservation Act. It is understood that the Minister of Conservation is currently considering amending the Act. While the amount and type of amendment will vary according to which solution Ministers choose, many of those consulted by the Officials Committee and the Officials Committee agree that:

- (a) the Conservation Act definition of a marginal strip should be changed to include land where a strip has been extended beyond 20 metres and there should be inserted into section 24 a section similar to 24(3) but aimed instead at circumstances where a strip greater than 20 metres is considered necessary. The legislation should make it clear, however, that 20 metres is the norm;
- (b) the Minister of Conservation (or officials of the department if the power were delegated) should be specifically able to grant an interest over a marginal strip. This would allow current uses to continue and future uses to be accommodated as well as satisfying the need for public safety and/or the security of facilities and equipment already in place on a marginal strip. It would ensure that the present limitation of only permitting interest to be granted to adjoining landowners (and then only if such interest is cited in the management plan) did not unduly restrict reasonable use of the strip;
- (c) the discretion of the Minister of Conservation to either enter or not enter into an agreement with an adjoining landowner for the use of all or part of the strips should be waived. This aims to ensure that agreements are established when requested by the adjoining landowner unless this would be contrary to section 24(2). The Minister should also have regard to public safety, and situations where both the adjoining landowner and another developer want an interest. The discretion for development on a strip should remain with the Minister. Further, guidelines for the closure of strips should be set by consultation between DOC and SOEs;
- (d) the Minister of Conservation should be able to waive a strip in its entirety upon notification in the Gazette. That is, the provisions for exemption from marginal strip requirements allowed for under the Conservation Act with regard to Electricity works should be replaced with a more general facility for exemption at the discretion of the Minister of Conservation. This should allow for

exemption, following notification in the Gazette, where the Minister is satisfied that any of the following conditions apply to the piece of land in question;

- (i) The land can be shown to have little or no value in terms of the objectives of conservation and provision of public access;
- (ii) The land is considered to be of value in terms of the objectives but the objectives can be more effectively met through another mechanism (covenant, conditions attached to sale, purchase of easement etc). An objective test will be required to ensure that this is the case. If it is not possible to arrive at an objective test then this section should not proceed.

(It should be noted that Electricorp strongly opposes the replacement of subsections 24(4)(a), (b) and (c) with a general section allowing exemptions at the discretion of the Minister of Conservation. Electricorp argue that asset negotiations have been conducted on the basis of current legislation and it would be inequitable to amend the legislation without a specific savings clause for land identified as part of Electricorp's core assets. It should be noted that if the Minister is satisfied with the process for exemption, then it might be useful to consider rewriting section 24(3) of the Conservation Act, which deals with the reduction in size of marginal strips, so that a similar procedure is followed for reduction. This would align the Conservation Act with the Land Act and Local Government Act and make the process consistent.)

- (e) there should be clarification of the intention in section 64 that where a decision had been taken in the past that no strips would be taken from land that became a lease or licence, strips will not now be taken. This could be extended to ensure that all section 58 strips less than 20 metres wide are not now increased, and is considered necessary in the interests of fairness and consistency. Ministers should note that it may be necessary to insert a similar amendment into the SOE Act to ensure that this will apply to those leases and licences going to SOEs as well as to those going to DoC;

- (f) Crown land reserved from sale under section 58 of the Land Act should be declared to be land held for conservation purposes under section 7 of the Conservation Act (and thereby declared "marginal strips" under section 24 of that Act). This would clarify the intention that existing section 58 lands should come under the administration of the Department of Conservation. There should be safeguards set up to ensure current rights of existing use of the section 58 strips remain.

(It should be noted that while officials agree that this proposal is sound in the medium term, some administrative problems could arise if all existing section 58 strips were declared to be conservation areas immediately. Some such strips may, for example, no longer be contiguous with a river which has changed its course since the strip was laid off. For example, in such cases a 20 metre wide conservation area might overnight be declared in the middle of a piece of farmland. The overall question of definitions of such lands has yet to be investigated. However, if the Minister of Conservation can grant an interest in the strips and dispose of them when they no longer meet the objectives, this problem will not arise. It is also considered that the administration of section 58 strips should be transferred from the Department of Lands to DoC as soon as possible.)

- (g) the management plans for marginal strips be dealt with on a national level and then (if DoC considers it necessary) on an individual basis at district level.

49 It would appear that for the Crown to retain ownership of the beds of lakes larger than 8 hectares and rivers with an average width greater than 3 metres that it currently owns, this will have to be explicitly reflected in the transfer of land to the SOEs. It has been suggested that it would be simpler if the Government abolished the ad medium filum rule, which is generally accepted to apply in New Zealand, but is contestable because the rule is rebuttable. The lakes and rivers will also have to be surveyed as title to the land they adjoin cannot be given if they are merely described. This paper, while noting these problems, is not the best place to resolve them. Officials felt they were more properly directed to the Resource Management Law Reform group in the first instance, but the decisions on marginal strips should not be held up on this account. Officials also noted that most of the delay and cost of survey is occasioned by the smaller streams. The Ministerial decision to retain in Crown ownership all beds of streams and rivers of three metres or more average width, could be amended. This, however, would not sit well with the legislation governing where strips are to be taken under all three relevant Acts. Financial

responsibility for lake and river beds is currently a matter of dispute.

50 The extension of marginal strips to other lands of the Crown would be a move which would better ensure that the objectives for which strips were established were achieved. It would also alleviate the worries regarding public safety and flood control expressed by Electricorp with regard to its hydro lakes and their feeder rivers. Where there are currently no provisions for strips, it may be possible to negotiate an appropriate management plan. However, this is dependent on the good will of the landowner and the availability of resources.

Public Consultation

51 A high level of interest has been shown in this issue by a range of groups including conservation groups, outdoor sports groups, Federated Farmers, commercial interests (particularly some State Owned Enterprises) and the media. It is therefore proposed that this paper (suitably modified) be released.

Officials' Committee

52 The Officials' Committee was drawn from the State Services Commission (Convenor) the departments of Lands, Conservation, Survey and Land Information; the Ministry for the Environment, the Treasury and the Crown Law Office.

Other Organisations Consulted

53 All the SOEs and the Parliamentary Counsel were contacted and invited to comment on the marginal strips policy and the proposals set out in paper SOE (88) 20. A number accepted the invitation and presented their case to the Officials Committee. The Officials Committee also received submissions from the Federated Farmers (oral), the National Executive of the Acclimatisation Societies (written) and the Federated Mountain Clubs (written).

Recommendations

54 It is recommended that Ministers:

- (a) note that until the policy on marginal strips has been resolved the transfer of assets to some SOEs is likely to be delayed;

Lake and River Beds:

- (b) note that policy on marginal strips cannot be divorced from policy on the ownership of lake and river beds;

- (c) note that retaining in Crown ownership the beds of lakes with a surface area of eight hectares or greater and the beds of large (navigable) rivers does not present many problems;
- (d) note that retention in Crown ownership of small rivers and streams with an average width of three metres will substantially increase both the survey costs and the time taken to complete a survey before land can be transferred to the SOEs;
- (e) either:
- (i) endorse the MCC/SOE decision of 13 May 1987 that "the beds of lakes less than eight hectares in surface area and the beds of rivers and streams less than three metres average width within lands to be transferred to SOEs should transfer to SOEs with all other beds retained by the Crown". This aligns with the marginal strips definition in the Conservation Act;
- or:
- (ii) agree that the beds of lakes greater than eight hectares, and the beds of navigable rivers, currently owned by the Crown should remain in Crown ownership;
- and:
- (iii) review the MCC/SOE decision of 13 May 1987 with a view to transferring to SOEs, the beds of unnavigable rivers and streams with an average width of three metres or greater;
- (f) note that DoC, in consultation with the State Services Commission, the Treasury, Ministry of Works and Development, Ministry of Transport, and SOEs where relevant was directed by the MCC/SOE on 13 May 1987 to report back on the implications of vesting river and lake beds in DoC as stewardship land under the Conservation Act;
- (g) direct DoC to consult with the Resource Management Law Reform group on (f) above;
- (h) request the Resource Management Law Reform group to consider the implications of the right of ad medium filum and advise the Cabinet Committee whether this topic should be included in the work being done on Resource Management Law Reform or referred elsewhere;

Options for Reform and Consequential Decisions:

- (i) agree either:
- (i) to transfer the ownership of all "marginal strips" to SOEs, on conditions which require their management as if they were marginal strips, until the strips can be considered individually (ten year limit) or until certificate of title is granted, whichever is soonest [Department of Lands]; or
 - (ii) there will be no automatic establishment of marginal strips except around the coast and identified lakes and rivers (though areas may be explicitly reserved from sale) and retain resumptive rights to marginal strips (i.e., require areas to be managed as if they were marginal strips, and retain the right to acquire strips with compensation upon these conditions being abused or if the Crown requires ownership, even when the property has been onsold [SSC, DoSLI, Treasury]); or
 - (iii) establish marginal strips in all cases and have the ability to alienate interests in the strips, including the ability to waive strips in entirety where defined criteria are met [DoC, Crown Law and Treasury];
- (j) note that substantial sums will need to be set aside for survey and legal costs;
- (k) note that should Ministers agree to (i)(ii) above a satisfactory method of funding the resumption of strips needs to be worked out;
- (l) direct the Treasury and the Department of Conservation to present to Ministers, within two weeks, a satisfactory method of funding the resumption of strips, should (i)(ii) be chosen;
- (m) note that should Ministers agree to (i)(i) or (i)(iii) above, Landcorp is likely to renegotiate the sale price for its assets and Forestcorp will want the decision taken into account during negotiations;
- (n) agree that should Ministers agree to (i)(iii) a change to the Conservation Act be made so that subject to section 24 (2) of the Conservation Act the Minister must, when requested to do so, enter into a management agreement with the owner of adjacent land for the owner to use all or any part of the strips. If the commercial use of the strip is sought by others as well as the adjoining owner

then the Minister of Conservation is to decide on the allocation of the interest;

Amendments to the Conservation Act:

- (o) agree to amend section 24 of the Conservation Act so that the Crown, not SOEs, has title to marginal strip land;
- (p) agree that the definition of a marginal strip in Section 2 of the Conservation Act be amended as outlined in paragraph 48 (a) to allow the strips to be greater than 20 metres in width;
- (q) agree that subsections 24(4)(a)(b) and (c) of the Conservation Act be replaced with provisions which allow for the disposal of/exemption from the requirements for a marginal strip and disposal of interest in a marginal strip, at the discretion of the Minister of Conservation, by notice in the Gazette, where:
 - (i) The strip can be shown to have little or no value in terms of conservation and provision of public access; or
 - (ii) Conservation and public access values pertaining to the strip can, objectively tested, be effectively protected through another mechanism; or
- (r) either:
 - (i) agree section 24(4) of the Conservation Act should contain a savings clause to recognise that those parcels of land which are identified as being part of the core assets of Electricity Corporation are excluded from the provisions of the Conservation Act for as long as they remain assets of the Corporation;

or:

 - (ii) agree section 24(4) of the Conservation Act should not contain a savings clause;
- (s) note that section 24 (2) (b) of the State Owned Enterprises Act prohibits the transfer to SOEs of Land subject to:

"Reservation from sale under section 58 of the Land Act 1948";
- (t) agree that existing legislation be amended to have section 58 strips declared to be held for conservation purposes under section 7 of the Conservation Act 1987 and therefore administered by DOC;

- (u) note that the purpose and intent of section 64 of the Conservation Act needs clarification;
- (v) agree either:
 - (i) 'maximum control level' in the Conservation Act is defined as the 'maximum normal operating level'; or,
 - (ii) 'maximum control level' in the Conservation Act is defined as the 'maximum flood level';
- (w) agree either:
 - (i) section 24(8) of the Conservation Act be amended to include all Lands of the Crown; or
 - (ii) section 24(8) of the Conservation Act not be amended to include all Lands of the Crown;

General:

- (x) instruct officials (or DOC) in consultation with affected SOEs to develop criteria for governing the closure of marginal strips;
- (y) agree that the Fencing Act 1978 should be amended so that section 58 strips are again excluded from the provisions of the Fencing Act.
- (z) agree that prior to implementation of decisions made on changes to marginal strips policy, this report, suitably amended for public release, be circulated to interested parties.
- (A) instruct officials from the Department of Conservation to prepare suitable drafting instructions and refer them back to the Officials Committee for endorsement.