MINISTRY FOR THE ENVIRONMENT

PROPOSALS FOR REFORM OF LAKE AND RIVERBED LAW

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CONTENTS

PART ONE

REVIEW OF EXISTING WORK ON STATUTORY REFORM FOR WATERCOURSE LAW

Six papers will be examined:-

A The Property Law and Equity Reform Committee interim report on the law relating to watercourses as presented to the Minister of Justice dated May 1982 ("The Law Reform Report").

B The Cabinet SOE Committee proposals entitled Marginal Strips: Effecting the Policy dated July 1988. ("The Cabinet Committee Minute").

C The thesis of M.R.G. Christensen entitled "Ownership of Riverbeds and the concept of Navigability: A comparative analysis", dated November 1985. ("The M.R.G. Christensen Thesis").

D A report to the Department of Conservation on the "Areas of Responsibility in Navigable and Non-Navigable Rivers and Lakes, Land Status and Deficiencies in Legislation and Common Law" prepared by A.S.D. Evans dated February 1988 ("The Evans Report").

E The conclusion of "The Law Relating to Watercourses Seminar" 1985 ("The Seminar Conclusion").

F The State Services Commission Report to the Cabinet Committee on State Owned Enterprises is dealt with in the section on issues raised by previous work.

A THE LAW REFORM REPORT - recommended reform as follows:-

1. Any Reform to be made by either an amendment to the Land Act 1948 or in a specific reform statute.

2. There should be new and precise statutory definitions of "river" and "riverbed", possibly based on width but in any event not based on any concept of navigability. The Report did not make a suggestion as to fixed width or a definition of riverbed, but noted existing statutory and common law definitions and raised the question of whether there should be a minimum prescribed width at all.

3. The common law distinction between tidal and non-tidal rivers should be abolished.

4. The common law concept of "navigability" should be abolished.

5. Express or implied grants of proprietary rights by the Crown, whether by statute or otherwise, and including traditional and customary Maori rights should be left intact otherwise reform could be seen as being unacceptably confiscatory of existing rights.

6. Whilst preserving existing rights as thought necessary the ad medium filum presumption should not remain intact other than for rivers less than the prescribed width.

7. Although some rights should be specifically preserved the Crown would need to have the power in regard to express and implied grants to declare the beds of any rivers to be Crown land.

That power to be subject to specific procedures including rights of objection, hearing and compensation.

8. The fee simple title to all riverbeds (wider than prescribed) should vest in the Crown - principal recommendation.

9. Section 261 of the Coal Mines Act 1979 should be repealed.

10. The Report noted that in so far as the recommendations listed so far could be seen as confiscatory that there were arguments available to the Crown minimizing or lessening the impact of such confiscation.

11. The common law AMF presumption would continue to apply in regard to rivers less than the prescribed width.

12. Some existing rights will have to be preserved e.g. the right of a riparian owner who owns land on both sides of a river to cross and to bridge and some rights, it may be thought, should be preserved e.g. shingle extraction, rights to repair banks.

13. The suggested reforms may provide an opportunity for the Crown to make a general statement as to public rights of access to and navigation on rivers where ownership of the bed is vested in the Crown.

14. In the interim proposed reforms should not make any attempt to deal specifically with the principles of accretion and erosion or problems arising therefrom.

The Report noted during the course of it's recommendations that rivers and water resources have become increasingly viewed as matters of public and national importance and concern.

The Report considered that the allocation of the country's water should be such as to satisfy the greatest possible number of beneficial uses.

It considered that it can no longer be seen as totally inappropriate or unnecessary that the Crown should have the ownership of riverbeds, rather than adjacent riparian owners.

The Report also noted that in 1983 the (then) "present day" reality is that private interests have become increasingly meaningless as more and more public rights are recognised.

It pointed out that "traditional, albeit increasingly limited, common law riparian rights arising from the ownership of the banks of rivers would not, at least in general terms, be affected by the proposed reforms" (e.g. rights to the uninterrupted flow, to take for stock and domestic purposes, and for controlling access).

B THE CABINET COMMITTEE MINUTE

The decisions taken by the Cabinet Committee are effectively wide ranging proposals for law reform relating to the ownership of rivers and their adjoining marginal strips.

For present purposes the main proposals are:-

1. That for all lands of the Crown being disposed of to State Owned Enterprises, there shall be a marginal strip around the sea coast, around lakes with a surface area greater than 8 hectares and along streams and rivers with an average width greater than 3 metres.

2. The Crown will retain ownership of the marginal strips.

3. The adjoining land owner's title will include the marginal strip, but the title will show a statutory exception registered on the title.

4. The statutory exception will give the Crwon ownership of the strip for the principal reasons of public access, recreation and conservation.

5. Crown ownership will give the Crown rights ad medium filum aquae.

6. Crown ownership of the strip will stay with the title should the land be on-sold or sub-divided.

7. Crown ownership will ensure that the strip will shift with the river or stream.

8. All strips to be 20 metres in width.

9. The Minister of Conservation to have the discretion to dispose of the interest in the strip or exempt lands from it where the strip has little or no value in terms of conservation and provision of public access and where those values can be protected through another mechanism and where current productive uses override the principles of the strip.

10. Existing marginal strips will be recognised under new legislation at their current width where this varies from 20 metres.

11. Existing legislation will have to be amended to have existing S58 Land Act strips held for conservation purposes.

12. The Crown will not dispose of a marginal strip without giving the first option to purchase to the adjoining land owner.

13. The legislation will provide that land managers are to ensure access to marginal strips wherever feasible (subject to the right for managers to close the strips to the public for operational and/or safety reasons) to meet the objectives of public access and recreation.

14. The legislation will outline the objectives of marginal strips as public access, public recreation and conservation purposes.

15. The adjoining land owner shall be entitled to manage the strips subject to certain conditions.

16. Where the Crown wishes to resume the strip the title holder will receive 90 days notice in writing.

17. On resumption the Crown will pay compensation.

C M.R.G. CHRISTENSEN THESIS

The author considered 3 possible methods of change:-

(a) Crown ownership

(b) A system of Public Trust along American lines

(c) Control through Management Plans

Crown Ownership

Mr Christensen had the benefit of reading the Law Reform Report and concluded:-

1. A general acquisition of all riverbed land is possible

2. The navigability concept is an anachronism

3. Adopting a particular width definition is just as arbitrary and difficult as the navigability concept

4. The means of eliminating private interests is by vesting of riverbeds in the Crown,but to be effective it would need to put an end to some private privileges

5. This raises questions of compensation

6. A major question is what would actually be lost if such lands were appropriated

7. Amend the Land Act to vest title in the Crown

8. Reserve Crown granted land (as determined by a Court) and existing uses

9. The rationale that lead the Crown to assume ownership of the beds of the sea and tidal rivers can today be extended to include all rivers and watercourses.

It is not proposed to deal with the public trust concept or the management plan proposal except to note that the author was very aware of the difficulties associated with defining a "riverbed".

The author concluded the thesis by saying that the traditional common law principles are no longer appropriate and not only does New Zealand have its own physical characteristics, but its needs have developed along different lines from those of England.

D THE EVANS REPORT

This Report is presently being edited within the Department and in its present form it is therefore considered a draft. At present it is difficult to summarize and review but in outline it recommends:-

1. All waterways (that is, no 3 metre or any other limitation) and lakes regardless of size should be vested in the Crown.

2. The AMF presumption should be rebutted.

3. The navigability criteria should be repealed.

4. There should be a new definition of riverbed and watercourses.

5. For land transfered to SOEs where there is a water frontage carrying the AMF presumption the land should be surveyed off and the riverbed portion remain as Crown land.

6. Once vested in the Crown the beds of waterways including lakes and tarns should be declared conservation or stewardship areas.

E THE LAW RELATING TO WATERCOURSES SEMINAR

The concensus of opinions of speakers and working groups at the seminar was generally in agreement as follows:-

1. Riverbeds should be defined.

2. They should be vested in the Crown.

3. Navigability and ad medium filum have no place in determining the status of riverbed land or lakes.

PART TWO

THE ISSUES RAISED BY PREVIOUS WORK ON PROPOSED STATUTORY REFORM

All of the papers examined and all of the writers studied on the topic, would agree that the difficulties and complexities of the present system of ownership and control are legion. For practical and for most legal purposes the law is so confused and obscure as to be almost unworkable.

It is an understatement to say, as the Law Reform Report did "the law in New Zealand as to the ownership of riverbeds is indeterminate", and again in the Christensen thesis "...the framework within which the Courts and those charged with the administration of matters dealing with ownership of riverbeds...is woefully inadequate for New Zealands' situation.

The Law Reform Report was the first comprehensive look at the difficulties of the topic. It was an interim report and was made prior to the modern legislation dealing with SOEs and conservation. It was a general assessment of the need to reform looked at from the point of view of the unsatisfactory state of the subject.

The Cabinet Committee paper is a purpose driven approach to specifically reform the topic to meet particular needs.

The Christensen thesis proposed reform to meet the perceived public

protection of environmental needs and values.

The Evans paper proposes reform in the main to achieve what is seen as proper environmental control and management.

THE GENERAL ISSUES requiring attention are:-

1. To recognize the public value of rivers and lakes for a myriad of purposes.

2. To reform the law in such a way as to:-

   (a) resolve ownership, access, use and management problems

   (b) such resolution to be workable definite and effective for the future.

THE KEY ISSUE

The key to effective law reform is to identify the purpose of the conceptual approach. Ownership of riverbeds and marginal strips controls access. Access incorporates recreation and conservation. Conservation is presently controlled by Catchment Boards and other agencies. Because of AMF rights access is at present patchy and sometimes prevented. The Cabinet Committee decision identifies access as a major issue. Reform in the way proposed by the papers examined and partially put in place by the Cabinet Committee should be carried over to all riverbeds over 3 metres and over all marginal strips associated with those rivers to give certainty and continuity.

AN ANALYSIS OF THE CABINET COMMITTEE MINUTE

The Minute is based on the State Services Commission Report dated the 10th June headed "Marginal Strips; Problems and Options", as amended by an undated memorandum signed by the Minister of State Services and headed "Marginal Strips; Effecting the Decision".

The memorandum stated the objects of any amended legislation to be:-

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

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

The Minute represents a number of steps forward towards law reform:-

1. On all Crown land being disposed of there should be a marginal strip...along streams and rivers with an average width greater than 3 metres.

   This decision reflects existing legislation in the Land Act, the conservation Act and the Local Government Act. The 3 metre minimum dates back to 1948. It has historical and legislative bases back to 1892.

2. Riverbeds to be owned by the Crown - to the middle line adjoining Crown land.

3. The Crown to retain ownership of marginal strips.

4. The marginal strip to shift with the river or stream.

5. Provide for public access, recreation and conservation.

6. Create fixed strips 20 metres wide.

These decisions are all praiseworthy and positive. Difficulties arise in putting them into operation. Some of the major difficulties are as follows:-

1. There has to be a workable definition of "river" or "riverbed".

2. The concept of including marginal strips in an adjoining land owner's title with a statutory exception giving ownership to the Crown is clumsy and on the face of it is totally contrary to the Land Act intention of reserving marginal strips from sale.

3. Vesting half of the riverbed in the Crown by retaining AMF rights has flow-on problems that need to be examined.

4. Retaining existing S58 strips at their existing width and retaining a fixed land ward boundary for those strips will cause administrative difficulties.

5. Problems relating to title and survey.

6. Retaining power in the Minister of conservation to dispose of the Crown's interest in a marginal strip or exempt land from the requirements for a strip where e.g. current productive uses override the principles of the strips, could create a mosaic of strips along waterways some of which could be used for public access and some of which could not, thereby negating one of the fundamental reasons for creating them in the first place.

<u>All of these problems need to be examined</u>:-

1. <u>The definition of "river" or "riverbed"</u>

<u>A Proposed Definition</u> of riverbed:- "Riverbed is that part of a river that is covered from time to time in average flood flow."

"Where a river has defined banks, but the flow of water between the banks is irregular, being confined to a small channel during the dry months and for the greater part of the year, but greatly increasing during wet weather and extending occasionally, in each year, from bank to bank, whilst in exceptional instances, happening once in every two or three years, when the rainfall has been long continued and of great severity, it overflows the banks, the "bed" of the river (in law) extends from bank to bank. It is not confined to the Channel in which the water is for the time being flowing in dry weather, nor does it extend beyond the banks to land over which the water flows in time of flood." <u>Kingdon</u> v <u>The Hutt River Board</u> (1904), 25 NZLR,145.

This was a decision of the then Supreme Court sitting in Banco - a decision of Stout CJ, Denniston J and Cooper J - a case stated by Stout CJ as president of the Compensation Court on questions of law arising on the hearing of a claim for compensation!!

That decision is the basis of the view that the bed of a river is that part of the bed covered from time to time in average flood flow or freshes or freshets.

The view of the State Service Commission that "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" defined as the normal amount of water flowing in ordinary rainy seasons. That is, neither flood nor drought conditions apply" - must be questioned. It is doubtful whether that view has any legal basis. It is probably unsupportable and in any event is inadequate for those rivers which are frozen for large parts of the winter months.

For such a definition to work effectively it should probably be related to photogrammetric surveys and management plans. It is precise enough to indicate to most people what they can and cannot have access to and is not too rigid and inflexible as to cause excessive practical problems. Any definition will have practical and legal problems. It is worth quoting M.R.G. Christensen:-

"It is the role of the law to provide the framework in which... a system can operate. Otherwise legal definitions and principles become, of necessity, too general to be of any practical use, or so specific as to be inapplicable or unhelpful in a great number of cases."

Given that the 3 metre definition already exists in the Conservation Act as "an average width of 3 metres" all that is needed to refine it is a simple amendment. As the definition at present stands and until there is some judicial decision on it, does it mean the average width taken for the length of the river or does it mean the average width from being dried up in the summer to full flood flow in the springtime or any other time. In other words is it length specific or width specific. It should be amended and this messy part of our law cleared up once and for all.

Because the law can never reflect the dynamic nature of our waterways any definition will have a degree of arbitrariness. It does not matter whether the definition is average flood flow, average yearly flow or some other contrived mean. It does not matter whether the legal definition is linked to photogrammetric surveys or to physical tests e.g. the establishment of the limits of terrestial plants.

What does matter is that the definition gives the general public a reasonable certainty on the ground, of knowing whether they are on or off the marginal strip.

If the suggested definition is accepted it encompasses the large shingle fan (i.e. the width of it covered by freshes) which at low flow carries a small stream below 3 metres but which at average flow exceeds 3 metres. It covers the small stream that does not flow in the winter because it is frozen over. It does not cover the permanently small streams and wetlands, but by and large it covers most of the country's waterways. Those streams and environments that are not included can be separately dealt with by the DOC by purchase, reservation, and management

plans. To decrease the defined width below 3 metres would, if there are to be survey problems, cause a great deal of expense and delay and where private rights are confiscated would require a great deal of compensation.

There is no historic or legislative precedent for going below a 3 metre width. To do so would be unduly harsh in confiscating private rights and, for what is gained, unduly expensive.

2. Ownership

The concept of having the marginal strip included in the adjoining land owners' title yet excepting it to belong to the Crown is confusing. It can only be suggested that the Cabinet Committee decision was taken in that way because of the memorandum from the Minister of State Services which said;

"the officials' committee agreed that the policy as outlined by Ministers would only be possible if the SOEs held the titles to the land, but there was statutory exception on the titles giving the Crown rights to the strips for access, recreation and conservation purposes. The statutory exception would also give the Crown the ad medium filum rights and be applicable should the land be on-sold. Mr Brian Hayes, the Registrar-General of Lands, agreed that the above method was possible. He stated that for the Crown to retain title to the strips using the Ministers' framework would require survey or the change of the entire Land Ownership legislation."

It is difficult to see why, if the Crown is to own the land, it should be in the adjoining owner's title (see the opinion of Parliamentary Counsel dated 12.10.88). If there are to be survey problems associated with transferring Crown land to SOEs then they cannot be overcome or made any less by having the adjoining land owner's title extend to the riverbed side of the marginal strip, rather than stop at the landward side of the strip. The proposed Cabinet Committee method is cumbersome and is the reverse of what was intended by the Land Act 1948 and its predecessors.

The opportunity should have been taken:-

(a) to retain ownership of all marginal strips in the Crown by vesting for particular purposes and

(b) to allow adjoining land owner's title to stop at the landward side of the marginal strip and

(c) to devise a regulatory method of enduring management and use of marginal strips by the adjoining owner.

In other words if the Crown is to own the marginal strips the legislation should say so clearly. Protecting public access, recreation and conservation values can only be achieved by the Crown and will always be at risk if marginal strips are included within adjoining owner's title.

It is appreciated that the Cabinet Committee may have been reluctant to take these steps because of the need to change the Land Transfer system or revoke S58.

3. Reserving AMF Rights

The reservation of strips by way of statutory exception giving ownership to the Crown was said to give the Crown AMF rights. Those common law rights were always and still are a right of ownership less than fee simple title. All writers on the topic agree that AMF rights should be abolished but past writers were not primarily concerned with Crown land until the State Services Commission Report.

There appears to be no reason at all to retain AMF rights to the Crown. It is much simpler to vest riverbeds in the Crown by statute whether in fee simple or otherwise. It can only be suggested that the Cabinet Committee was aware of the difficulties in not having a definition of riverbed beyond that in the Conservation Act and therefore chose to retain AMF rights to ensure that the marginal strips would move as the rivers move from time to time.

Where SOEs own land on either side of a river by virtue of retaining the AMF rights the Crown owns the whole of the riverbed anyway. The present decision will create problems where there is e.g. SOE ownership on one side of a river and private ownership on the other side. Very often there will be a S58 strip on the opposite side and in some cases private ownership with AMF rights.

If the object is to ensure that marginal strips move with the river then by far the easiest method is to define the riverbed so that marginal strips follow the line of the riverbed from time to time and for all time.

Outright vesting should be preferred to retaining AMF rights for SOEs and for all other land.

4. Retaining Fixed Landward Boundaries for S58 Strips (described hereinafter to include unformed road reserves)

A lot of the problems with our present law result from having fixed landward boundaries on S58 strips, when the rivers have substantially moved away from the surveyed lines. In these cases there is accretion to the strips and where these accreted areas adjoin farmlands the occupiers of the adjoining lands use and often enjoy them rate and rent free. In some cases these berm lands as they often called are leased by local authorities, Catchment Boards, Landcorp and the DOC (S 53 Conservation Act). Very often they have little or marginal productive value but have high environmental and/or recreational value. Historically they have caused extensive management and administrative problems from the need to give occupation licences, leases, provide weed control and provide for stock watering.

In a great number of cases the river has moved so far away from the surveyed line of the S58 strip that quite extensive areas, some of which are productive and many of which are not (see Figure.11), lie between the landward side of the strips and the waterway. Legally speaking a lot of this land is unoccupied Crown land having accreted to the existing strip.

If there is to be a workable system of having marginal strips that are moveable then the accreted S58 strips will have to

be dealt with. The strips themselves will have to be put into different ownership and the accretions to the strips either sold to adjoining owners to bring the adjoining owners land to the landward side of the new marginal strip, or reserved to be dealt with as floodplain by the DOC.

Where the rivers have moved away from the existing strips to leave good productive land then it is to be expected that adjoining owners would wish to have ownership of those lands. Where, as with many of the braided Canterbury, Southland and Hawkes Bay rivers, the river has moved away to leave great expanses of shingle and unproductive land then it is not expected that adjoining owners would wish to purchase. Those lands are highly prized as land to be conserved by the DOC and highly valued by the Acclimatization Societies as wildlife habitat and generally as being part of our natural environment which warrants protection.

The concept of moveable marginal strips will not work properly unless the accretions to the existing strips and the strips themselves are altered as to ownership. Take for example a river such as the Rakaia River in Canterbury. For some lengths of that river there is a strip shown on adjoining freehold title. The strip may extend on one property for a legal river frontage say 1 kilometre long and then for the adjoining kilometre there may be no strip. Further along again the strip may re-appear on a title (see Figure. 10). Unless the marginal strips are made to adjoin the defined riverbed then for quite extensive areas there will be a hopeless zig-zag pattern of a sometimes very wide marginal strip adjoining the actual defined riverbed (see Figure. 7).

The aim should be to have consistency of width combined with a reasonable certainty of knowing where the strip is on the ground in the interests of the public generally and adjoining owners in particular.

5. Title/Survey/SOE Land

Until the problem of adjusting fixed and presently surveyed landward boundaries of existing S58 strips can be overcome to make the strips, where they have accreted, either part of a conservation area or truly moveable to lie adjacent to the riverbed, then there will be problems of title and the need to survey.

The Registrar-General of Lands has already been quoted as saying "that for the Crown to retain title to the strips using the Ministers framework would require survey or change of the entire land ownership legislation." This problem arises from the need to transfer land to SOEs and retain strips. Retaining the fixed presently surveyed landward boundary, where is exists, enables the Crown to transfer to SOEs without survey. The State Services Commission memorandum noted;

"It has been suggested that provided an interest in the strip is given to the adjoining owner 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.

If title is to be given there needs to be certainty of area or the title must be "limited as to parcels." Issuing titles limited as to parcels may well overcome the need to survey and should not pose legal difficulties. This method possibly could be used in all transfers to SOEs whether or not a S58 strip presently exists. If it does exist then there is a fixed landward boundary and accretions to the strip would still belong to the Crown and could later be divested or reserved to DOC. Where strips do not presently exist they would be created.

The Crown's need to give title to SOEs for land adjoining rivers and lakes is one thing. The need to reserve marginal strips is another. If SOEs do not require a fixed area but would accept title limited as to parcels there should be no need to survey. This would allow the new marginal strip to move with the river without the need for future surveys. The existing accretions to S58 strips could therefore be dealt with later and either divested or reserved, and the newly created strips could come and go on the ground with accretion and erosion without undue interference to land reserved or the adjoining occupier's title. If it was ever desired by the adjoining owner to have a fixed area within the title, that is, not limited as to parcels, that adjoining owner would have to undertake a survey in which case land accreted to the S58 strips that was not required by DOC could be sold and land of a sensitive nature could be retained as reserve.

It is suggested that there is no need for the Crown in respect of riverbed and marginal strips to do other than vest those parts of riverbeds and marginal strips decided upon along riverbeds and lakes, not already vested in the Crown, in perpetuity without the present need for title or survey.

Private Land

At present where there is a surveyed strip along rivers, very often because of river movement, no-one knows where it is on the ground. No-one knows the width of it because the landward boundary was pegged many years ago, and is well away from the actual waterway. Conversely, where the river has eroded into and through the S58 strip, it no longer exists. This is simply because we imported into New Zealand law the English common law without having regard to the dynamic nature of our rivers. Unless there is ownership to the bank of a river or ownership AMF then somewhere there is a fixed landward boundary to a S58 or other statutory strip, or to Crown land. For practical purposes it is usually not necessary to find that landward boundary as the adjoining owner by and large enjoys the use of the strip and accretions to it. If the reforming legislation is to create moveable marginal strips along all rivers over 3 metres then there will be compensation problems arising from the confiscation of AMF rights and rights that attach to riverbank boundaries. There should be no survey problems (at public expense) for other private land if there is an overall vesting in the Crown without title and if S58 strips have accreted. Survey problems will then relate to the wishes of adjoining owners to purchase the no longer deemed necessary, accreted marginal strips.

The problem then for SOEs is to create a moveable strip giving adjoining owners an acceptable form of title. The problem for private land is primarily the identification of rights that are to be lost and compensated for.

It is vital that any reform, on completion shows no distinction between SOE land and private land.

6. Power to Dispose of or Exempt the Need for Strips

Under the Cabinet Committee decision as it at present stands there is power given to the Minister of Conservation to allow for the disposal of or exemption from the requirements for a marginal strip and disposal of the interest in it where:-

(a) the strip can be shown to have little or no value in terms of conservation and provision of public access;

(b) conservation and public access values pertaining to the strip can, objectively tested, be effectively protected through another mechanism;

(c) current productive uses override the principles of the strips.

If this decision stands and some land is exempted from the requirement then there could be a mosaic of some river frontage having a strip and some being exempt. Whilst there may be a need in some cases for exemption it should be severly restricted in the interests of public certainty. The power to dispose of this strip, negates the reasons for reserving such land from sale, that go back almost 100 years. It should be considered that public access, recreation and conservation purposes are paramount; and that the needs to give reasonable accuracy of definition and certainty of availability, are primary.

SUMMARY

1. All writers agree on the need for reform.

2. The Cabinet Committee Minute is a great advance towards reform, but needs to be re-worked for practical purposes.

3. The State Services Commission Report makes it plain that a do nothing approach is no longer acceptable. Reform is necessary.

4. The present proposed SOE reforms create major difficulties with the Conservation Act as it is presently in force.

MAJOR PROBLEMS

1. Finding a suitable definition of riverbed.

2. How to vest riverbeds and marginal strips in the Crown, minimizing surveying expenses.

3. How to deal with S58 strips and other existing strips that have existing fixed landward boundaries.

PART THREE

THE ISSUES RAISED BY THE HON. MR PALMERS'S PAPER TO THE 1985 SEMINAR

The speech conveniently falls into four parts:-

1. The pro's and con's of law reform.

With the complex and difficult subject of reform in this area great caution is called for to meet the problems that have been shown in the existing work examined and to meet the needs that are highlighted by those papers. The various conflicting private interests and the overall public interest have to be weighed and balanced to give as Mr Palmer says, certainty, fairness, a mechanism for the proper balancing of policy considerations and simplicity of application. Nothing could be truer than to say 'the hard part is to say how it can be improved in a way that will meet general acceptance as well as operate clearly and predictably."

2. The relative merits of statute law and common law.

The great merit of the common law is that with the passage of time and over changing circumstances it develops a system of logic leavened with commonsense that can be applied for practical purposes. It is flexible and adaptable and it is very true to say that in New Zealand in recent years we have developed a common law of our own that is increasingly adaptable to our particular circumstances. The sad fact is that we have water law in part based on an inappropriate (for New Zealand physical conditions) common law and a mish mash of statue law containing historical anomalies and out of date and unworkable definitions. Matters relating to water law have not become before the Courts sufficiently often to give any clear guidance and sense of direction. Whilst the law as it stands has a complex beauty of its own it is difficult to find, it is inappropriate for many practical circumstances and very often it does not work. If there is a present opportunity to clarify it simply and effectively that opportunity should be taken.

3. Better use/access

There is a great need for the public to know clearly and precisely what rights people have to enjoy our waterways. At present those rights are obscure to say the least. Very often after careful legal examination they do not exist. At the same time long-held private property rights should be given recognition and if they are to be diminished in the public interest, then proper compensation should be payable.

4. The public interest in the environment

Public interest in environmental law has greatly increased in recent years. Legislation enacted goes a long way to meeting those needs e.g. the Conservation Act, the Walkways legislation, Water Conservation Orders. As the law is to be generally reformed reform of water law is fundamental.

PART FOUR

ASSUMPTIONS/NEEDS/AIMS

1. The problems associated with vesting of lake and riverbeds in the Crown and creating marginal strips are inseparable.

2. There should be no distinction between state owned land or land owned by SOEs and private land.

3. There should be a suitable definition of riverbed.

4. Riverbeds and marginal strips should vest in the Crown.

5. Vesting should allow for an interest to be given to the Maori people on resolution of present and future claims.

6. Riverbeds and marginal strips should be given a status that ensures their protection and preservation in perpetuity.

7. Marginal strips should follow the lines of riverbeds as they move from time to time.

8. All strips should be 20 metres in width adjoining the riverbed or such greater or lesser width as may be needed for environmental protection or access.

9. Private title should never come closer than the landward side of the marginal strip .

10. River and lake beds and marginal strips should vest without the need for complete survey and without great expense by way of compensation.

11. Adjoining owners should have use and management by way of a statutory licence (or otherwise) but not title or ownership.

12. Waterways within metropolitan areas should be excluded from vesting in the Crown.

13. Reform of ownership occupation and use should ensure proper use for production, control of weeds, domestic and stock water supply, fire control, and trespass.

THE ASSUMPTIONS/NEEDS/AIMS CONSIDERED

1. The problems of riverbeds and marginal strips are inseparable:-
There is no argument here.

2. There should be no distinction between state owned land and private land:-
There is no argument here.

3. There should be a suitable definition of riverbed:-
There is no argument here.

4. Vesting in the Crown:-

At the moment there is what can be called negative vesting by S58 reserving land from sale. Positive vesting is needed for the

particular stated purposes. There need not be title given and neither is it necessary to achieve the purposes of vesting. The vesting should be in perpetuity with specific exceptions e.g. the need for harbour protection works, the health, safety and welfare of the public.

5. Reform should enable Maori claims to be settled equitably:-

Vesting in the Crown will allow an overlapping vesting in the Maori people if that is decided upon. This concept has precedent. In Christchurch for parts of the Heathcote river there is vesting in local authorities AMF by virtue of road reserves along parts of the rivers and in the Christchurch Drainage Board by virtue of its Act. The Drainage Board Act vests the beds of the Heathcote and Avon Rivers in the Board although not as to the fee simple title. This duality of vesting or overlapping vesting works in that the territorial local authority looks after and controls the banks of the rivers and the Drainage Board looks after and controls the bed.

If then the Crown had vested in it the riverbeds and the marginal strips it would be perfectly possible to have an outright or overlapping or overlying vesting in another authority or in the Maori people. Until vesting is achieved any settlement of Maori claims that might be effected cannot be given any purposeful resolution.

6. Riverbeds and Marginal Strips to be vested for particular purposes:-

There is no argument here.

7. Strips should be moveable:-

To be effective the strips must be moveable to follow the line of the riverbed as it moves. Even high banks move as they are eroded, and braided rivers, particularly in Canterbury, are constantly moving.

A number of possibilities need to be explored;

(a) if existing S58 strips and other strips (i.e. pre-Conservation Act strips) are abolished and there is to be a new conservation strip adjoining a suitably defined riverbed then

- the existing S58 strips and the accretions to them cause problems for transfer of ownership

- if they are to be sold and amalgamated into adjoining titles then they will definitely need to be surveyed.

- if compensation is to be paid to private AMF right holders then the obvious source of funds for that compensation is the sale of the strips and their accretions

- the opportunity should be given to the DOC to retain sensitive accreted strips

- until the landward boundaries of accreted strips are adjusted there will be administrative problems in leasing and otherwise dealing with those lands
- if the accreted strips are not able to be retained then important wildlife habitats and recreational areas will be lost to public use.

Where a river has eroded through a S58 strip into freehold land there is no S58$_A$ strip until a similar strip is created following survey under the Local Government Act. In those cases the owner adjoining the river loses land to the river. There is no compensation and at present little subsidy available to prevent the river further eroding into private land.

If the conservation strip is created as a matter of law to become moveable then there will be a strip vested in the Crown on land which was otherwise freehold in fee simple or leasehold or as may be. Where a new strip replaces an old one there should be little or no compensation.

To be workable the use and management of that newly created strip should be with the adjoining owner. If a statutory licence is given to adjoining owners to use and manage the newly created strips then the detriment to the adjoining owner is minimal and compensation should reflect that. An example of a licence issued by the DOC for land adjoining a river is attached.

Where a riverbed and its adjacent strip moves about within the floodplain of the river, the encroachment onto adjoining AMF lands will be often physically significant, but the land encroached upon will be of marginal productive value although of high environmental value. In those cases it is expected that the DOC and Catchment Boards would have control of the floodplains in any event, and compensation would therefore be minimal. The issue of compensation for creating strips over existing AMF land and creating strips due to erosion over private land will be the main issues.

If marginal strips are to have certainty and consistency, private AMF rights, and the rights of land owners owning to the banks of rivers to claim accretion, will have to be altered. To retain those rights will create a mosaic of land ownership along rivers that will be unacceptably complex. (see Figure. 7). Compensation will be called for. Under the proposed reforms the adjoining owner will have the use and management to the defined riverbed. It is to be expected that the revenue available to the Crown from sale or lease of accreted S58 strips will equate to compensation payable under any confiscatory provision, but this will require careful analysis.

Crown granted land giving ownership AMF will cause problems. These lands will need to be identified. Surveys may be necessary.

The Crown grant owner who previously could exclude the public from access along the waterway would no longer be able to do so.

At present there are rivers to be excluded from such proposals, in the interest of the already identified and accepted claims by Maori people. Rivers with settled Maori claims should remain as they are.

Riverbeds already vested in local authorities e.g. the Ashley and Waimakariri Rivers vested in the North Canterbury Catchment Board can be subject to the reform without major management problems.

(b) if existing S58 strips are to have fixed landward boundaries as has been decided by the Cabinet Committee, then

- the adjoining owner will not be able to claim accretion
- the adjoining owner will be subject to erosion as before
- the land between the adjoining owners' boundary and the landward side of the new marginal strip will continue as before to be unoccupied Crown land
- the opportunity to adjust landward boundaries to follow rivers will be lost
- there will be no funds available from the sale of those lands to fund conpensation for confiscation of AMF and other rights
- the age old problem of highly mobile rivers moving within artificial boundaries will be maintained

(c) BERM LANDS

If the definition of riverbed or some other definition is acceptable, and if it is accepted that there be a moving marginal strip along a moving river, then in the case of many braided rivers there will be great widths of land between the landward side of the marginal strip and the true banks of rivers. That land will continue to be administered by Catchment Boards and the DOC.

There are 3 great merits in abolishing a fixed landward boundary for S58 strips:

1. To have ownership of lands adjoining rivers more closely equate to the actual line of riverbeds.

2. Make available funds from sale

3. Avoid a mosaic of landward boundaries that do not reflect the actual course of the rivers.

8. The Width of Strips:-

Marginal strips have been reserved from sale or set aside under S58 of the Land Act 1948, Section 24 of the Conservation Act 1987 and Section 289 of the Local Government Act 1974. Strips have a different status depending on which Act applies. The State Services memorandum noted "all three acts allow for a reduction of the the width of any strip to 3 metres minimum, although in the case of the Conservation Act this is subject to a process of public notification and consultation."

As the Cabinet Committee decision stands it is contemplated that strips could be alienated to private ownership and the usage of them controlled in the interest of adjoining owners' land management. If the object of legislation is as the State Services memorandum sets it out to be, "to provide permanent public access for recreational purposes to the coast, lakes and rivers, that is, to water and to provide for the conservation of the natural and historical values of the strips and of the adjacent water" - then the Cabinet Committee decision will have to be amended.

As there is historical precedent for reduction of the width of strips this should be maintained, although the reasons for reduction should be very clear and should have everything to do with providing permanent public access, protecting the environment and ensuring the health, safety and welfare of the public.

The question of access being unavailable around bluffs, and thereby creating a need for alternative access is not dealt with.

The question of whether strips should be wider than 20 metres is covered under the discussion of the moveability of strips.

The law relating to strips created by various statutes should be uniform.

9. Private Title:-

As has been discussed, to vest title for SOEs in adjoining owners to the riverbed side of the marginal strip, is clumsy and is not what is needed. Private land ownership has historically been found to be in conflict with public rights and expectations of access.

10. Survey and Compensation:-

These questions have been explored. The need to ensure effectiveness without great expense, and certainty of access and environmental protection without unduly impinging upon private rights of ownership, is important.

11. Use and Control by Adjoining Owners:-

It is desirable that adjoining owners have use and control. They are the logical occupiers to manage the floodplain land up to the defined riverbed.

Confiscation without granting to adjoining owners management rights and use, is harsh.

The sale of productive land and land that is not needed by the DOC will generate funds, as has been discussed.

The simplest and most effective method of ensuring proper use and management is to grant a statutory licence, on terms to be decided relating to weed control, fences, grazing, tree planting, cultivation, taking water etc possibly along the lines of the DOC licence attached.

The statutory licence should run with the adjoining land in title. On the title should also be shown the vesting of the marginal strip.

The vesting should incorporate notice that the strips may intrude into freehold land as a result of river movement. DOSLI could divise such a certificate to go on all waterway titles.

12. Excluding Metropolitan Areas:-

This is necessary, but will be difficult to achieve because of the need to strike a suitable definition. All present private rights of ownership use and enjoyment should be retained.

13. Weed Control etc:-

The administrative effort and cost of weed control along riverbanks is often understated. Giving adjoining owners a statutory licence will overcome these difficulties. A licence will ensure that adjoining owners have access to domestic and stock water and continue most existing riparian rights that are otherwise permitted without infringing existing Catchment Board by-laws.

14. Protecting Identified Rights:-

Existing Maori Tribal rights should be recognised and exempted from reform provisions. It is considered that there are very few other identifiable private rights that would not be otherwise provided for in the proposed reform. Following the passing of the modern Town Planning legislation and control by Regional Water Boards of riverbeds there are very few private rights that may be freely exercised without infringing the relevant legislation or by-laws.

THE ASSUMPTIONS/NEEDS/AIMS - HOW THEY CAN BE MET;

1. Vest by statute all riverbeds over 3 metres wide (as defined or as defined in some other way) in the Crown for public access, recreation and conservation purposes. The vesting need not be in fee simple so as to warrant title being taken. The vesting to exclude those rivers and lakes already subject to settled Maori claims.

2. Create marginal strips along all vested waterways also to be vested for public access, recreation and conservation purposes, but not necessarily as to a fee simple estate.

3. Abolish S58. Re-vest unformed roads in the DOC. Retain existing formed roads in Councils. Accretions to roads to vest in the DOC.

4. Marginal strips to be 20 metres wide, sometimes wider but not narrower, unless for good reason as earlier discussed.

5. Such vesting to be in perpetuity, with exceptions as earlier discussed.

6. Allow adjoining owners with fixed landward boundaries adjoining

existing S58 strips to purchase the land between their fixed boundary and the landward side of the new marginal strip, reserving to the DOC the power to first reserve thsoe lands for environmental purposes.

7. Where land between the landward side of the marginal strip and the landward side of the existing S58 strips is not to be reserved or purchased then if it has productive value adjoining owners be able to lease that land.

8. Create a statutory licence to give rights to adjoining owners to use the marginal strip to farm and to manage it, control weeds etc with no power to the adjoining owners to exclude the public, but with power to prosectue under the Trespass Act if abuse occurs.

9. Power to exclude the public to be given to the DOC, but only to be exercised in the interests of the health, safety or welfare of the public.

10 Apply funds received from sale or lease of accreted S58 strips towards compensation for the loss of AMF lands and other confiscated lands or rights that require compensation.

LAKES

Abolishing the concept of navigability clears the way to vest lakebeds in the Crown that are not already vested.

There should be no difficulty dealing with accreted S58 strips, other strips and Crown land already around lakes. The proposal to repeal S58 and modify AMF ownership clears the way for vesting marginal strips around lakes.

Creating a marginal strip around lakes requires a definition of lake edge.

It is desirable to have the strip created from a high level to ensure continuity of access and to afford protection to wetlands associated with lake margins.

The present definition in the Conservation Act needs to be refined. The definition as it at present stands is "The normal level (or, in the case of a lake whose level is subject to intentional alteration, the maximum control level)... ."

The State Services Memorandum considered the question of what is a maximum control level. This problem needed to be looked at because of the position of Electricorp. It was said "Electricorp is happy for this to equate to the maximal normal operating level, so long as the land currently held as the "maximum flood level" is contained within a marginal strip and the Crown (specifically DOC) has title to the strip. This is not difficult as the boundaries of the maximum flood level are well defined and will not require survey. The request that the title remain with the Crown is so that Electricorp only has to deal with one manager rather than numerous managers as would be the case were the land in the "maximum flood level" to be offered to adjacent land owners. However, this would mean that in some cases the width of the marginal strip would

vary from 20 metres. This is unavoidable where the Crown owns land around water, but not extending back from it to any degree. The problem can be overcome by specifying different criteria for manmade lakes and reservoirs."

The State Services Commission Memorandum was adopted by the Cabinet Committee for State Agencies on the 7th December 1988. The Committee agreed "(a) that 'maximum control level' in the Conservation Act 1987 be defined as the 'maximal normal operating level'; and (b) that where a strip is to be retained around a controlled lake or reservoir it should extend 20 metres (wherever possible) or to the maximum flood level, whichever is the greater." The Cabinet Committee's decisions do not take any further what is "normal level". Presumably "maximum normal operating level" can be ascertained.

The difficulty with the Cabinet Committee decision is that the maximum flood level would appear to include the 20 metre strip when a lake is high thereby negating access.

If there is to be certainty and consistency the marginal strip should run from the maximum flood level so that access can be enjoyed at all time. When a lake is below it's maximum flood level the strip will be consequentially wider.

VARIOUS INTEREST GROUPS CONSIDERED:-

1. The public

2. The Acclimatization Societies

3. Farmers/adjoining owners

4. AMF owners

5. The Department of Conservation

1. The Public

The rivers and waterways are our heritage. They should be preserved for the future as a primary part of the physical environment to be enjoyed and used by the people. To be workable access needs to be certain and practical. At the present time water users along many of our waterways have no sure knowledge of their rights and in many cases may be none the wiser after consulting surveyors and legal advisers. In the interests of the public clarity and certainty of law is essential.

2. Acclimatization Societies

Mr WB Johnson Director of the New Zealand Acclimatization Societies in his address to the 1985 seminar said "Most river users mistakenly believe that public access strips exist along the majority of, if not all, watercourses. Furthermore the majority of such users would state that this "free right of access" extends to the often scrubby (but ecologically and recreationally important) berm lands immediately adjacent to watercourses. Indeed it is the ecological diversity of the land/water interface (i.e. the river plus berm land) that is the natural attractant to the general outdoor loving public. In wildlife management this is known as "edge effect" and applies to people equally as much as it does to other animals."

The present reform proposals take account of the actual and perceived needs in vesting in perpetuity the riverbeds and the marginal strips over relevant waterways. The berm lands or floodplains are covered by the reservation to the DOC enabling the DOC to take those sensitive lands adjoining the marginal strips for conservation purposes. That is where those lands are not freehold but are rather accretions to existing S58 strips. In most respects therefore it is expected that the wishes of the Acclimatization Societies and their members would be met. In that they may not be all met for all purposes at least the reform would be a very great advance on the present unsatisfactory position.

3. Farmers/adjoining owners:-

Where adjoining owners have existing S58 strips which truly follow the river or the riverbed then the position is unchanged.

Where adjoining owners have S58 strips that are well away from the waterway there is no disadvantage except that what they have previously enjoyed rent and rate free would be leased to them or reserved to DOC. If it is productive land that has accreted to the strips then under the proposed reform the adjoining owner has the opportunity to purchase.

It is to be expected that in many cases the cost of survey would exceed the value of the land. In those cases, for the sake of making ownership more truly conform to the line of the waterway, it may be desirable to come to some accommodation with adjoining owners by way of contribution to survey costs.

Adjoining owners who are subject to erosion were subject to the force of the river in any event. Under the proposed reforms they will be disadvantaged to the extent of having a conservation strip vested over their fee simple title, but in all other respects will continue to have a statutory licence to use and manage that strip.

In all other respects rights to take stock water and domestic water and other necessary rights will remain intact.

Trespass; If a statutory licence is created then it may be necessary to give adjoining owners the same rights to prosecute that land owners generally have under the Trespass Act. It is suggested that mere licencees do not have power to prosecute and therefore an amendment may be necessary.

4. AMF Owners

Under the proposed reforms owners with Crown grants would have their riverbed lands confiscated to the Crown. Many of this group would be disadvantaged although compensated. It should remembered that the State's power to acquire proprietary rights by confiscation would be seen by many to be oppressive.

If there is to be consistency of application of marginal strips, then as Figures. 7 to 9 show, unless access can be provided on AMF land, then the worth of the reforms would have to be questioned.

AMF owners, particularly those who own on either side of a river, are in an advantageous position. That land, for historical reasons, has enhanced value. For example if an owner having AMF rights with ownership on either side of a river wishes to build a golf course then that owner can exercise existing rights to take shingle, to bridge

and to control access.

5. The Department of Conservation:-

The Evans Report advocated vesting of all waterways in the Crown. As has been discussed for reasons of cost this may not be considered practicable. Another major problem is setting a bottom limit on flowing waters. This may be harder to do than to set a 3 metre average width. There would be problems with ditches and such like. It must be recognised that many small streams, that is below the 3 metre minimum, are environmentally and ecologically sensitive. If the reforms proceed as proposed then it is to be hoped and expected that suitable environmental controls can be put in place for small streams (See S 53 (2)(h) of the Conservation Act).

PART FIVE

ALTERNATIVES

Alternative Definitions of Riverbed

There has to be a definition of riverbed so that there can be a boundary from which the marginal strip can be created. As has been discussed this is a very real problem for private land in particular. Without a suitable definition the purpose of the proposed law reform founders.

Where a river generally flows bank to bank within defined banks there is no problem with definition. The further the waterway is from the bank and the more the water meanders within the banks the greater the problems of definition and management become.

One of the advantages of adopting the relatively confined definition of average flood flow is that the marginal strip can be readily visually identified.

It also allows the floodplain beyond the landward side of the marginal strip to the true banks, to be managed as before by the various regulatory agencies.

Some of the difficulties in adopting average flood flow will be:-

- what is the average over what period
- what is the average where a river is not measured as to floods
- what is the minimum flow which counts as a flood

These questions will always pose real problems. The answers will never be exact and true, but there must be a definition.

A definition that is wider e.g. "bank to bank without overflowing" would increase the cost of compensation by having the strip encroach on more productive land as that land would be further away from the actual waterway. For braided rivers if the strip follows a narrower (by definition) waterway then that floodable land has less value.

Confiscation of AMF Land Re-considered

It is possible to vest existing AMF owned riverbeds in the Crown

without a great deal of disadvantage. The adjoining owners would continue to have rights to water for stock needs and other purposes. The right to take shingle would be lost as would other riparian rights involving the riverbed not otherwise affected by Catchment Board by-laws.

Land adjoining the riverbed will almost always be more valuable to an owner.

To achieve the object of creating access and maintaining consistency of approach and unification of the law, it may be possible to stop short of vesting the adjoining marginal strips in the Crown.

Granting to the Crown a right of access only over a 20 metre strip (or narrower) adjoining the defined waterway, would achieve the purpose.

If that were done the compensation payable would be minimal compared to confiscation. This alternative should be considered. It has much to recommend it.

As a further alternative AMF owners could be invited to relinquish the marginal strip land and be compensated. On relinquishment the owners would lose ownership but would retain management and use if the land was not required by the DOC, by virtue of the statutory licence. Many AMF owners have a middle line boundary defined at the time of Crown grant. Where the river has since moved, right lining the present landward side of the marginal strip will have advantages to some AMF owners.

Another merit of this alternative is that it would go a considerable way to muting the outcry from AMF owners which would be expected if there were total confiscation.

There may be little outcry for four reasons:-

1. Most AMF owners already allow access to the, likes of fishermen, canoeists, trampers etc.

2. For many years Lands and Survey leased flooplain land to adjoining owners until it found that those leases did not have a statutory base because AMF applied to the adjoining land. Although refunds of rent were expected to be claimed at least in Canterbury none were.

3. The Rakaia Conservation Order is now in place. That order did not define the river or riverbed. As far as is known no AMF owners have complained that their rights have been imposed upon or taken away.

4. AMF owners adjoining unproductive riverbeds have traditionally been conscious of their obligation to control noxious weeds and the expense of doing so.

Finally for all practical purposes the alternative of creating statutory access without vesting AMF land will have no impact on the position after reform as shown on the diagrams attached.

Re-consideration of the Cabinet Committee Approach/Moveable Strips

It has been argued that re-working the Cabinet Committee approach to SOE land, in the ways proposed, gives greater clarity and cer-

tainty for SOE land and enables the principles from those reforms to be applied to other riverbed land throughout the ocuntry.

It is of paramount importance that our law be uniform.

If the Cabinet Committee approach as it as present stands is applied to other riverbed land then difficulties arise because of the variety of ownerships along riverbeds. As has been discussed there is AMF land, land with a true river frontage, S58 strips, Crown land and local authority lands, all of which, in one way or another, come within the four categories of ownership shown on Figure. 1.

If one of the primary objects of creating marginal strips is to ensure access there is no point in having adjoining owners enjoy title to the waterway reserving the marginal strip to the Crown. For other than SOE land that approach would cause more practical problems than it would solve.

The object of the proposed reforms is to put consistent access in place, and to give recreational use and environmental protection from that access. That is why a relatively narrow definition of riverbed has been adopted. This approach ensures a minimum interference with land adjoining waterways and enables existing regulatory controls to continue.

If the Cabinet Committee approach were to be applied to other than SOE land then many owners adjoining waterways would be given title to land that is unproductive, and which they do not want. It could be expected that this could create an outcry greater than confiscation of AMF rights or creating limited access over AMF land.

The proposed reforms should therefore be seen as a method of clarifying the law as simply as possible, whilst retaining existing systems. The reforms presuppose alterations to the Cabinet Committee's approach (which alterations are not difficult to make) so that that approach can be applied to all waterways.

With the passing of the Conservation Act marginal strips have a far greater significance than they did at the time of the Law Reform Report. It is a short further step to amend the Conservation Act to give a suitable definition. Given the Conservation Act and the Cabinet Committee decision, the systems are in place upon which to build reforms that are necessary, timely and workable.

The proposed changes to the Cabinet Committee approach are conceptual changes only, to be made for two purposes:-

1. To take out the difficulties arising from the Committee's approach and

2. Apply the amended concept to environmental and land law generally.

The practical consequences in changing the Cabinet Committee's approach are not significant for SOE land.

PART SIX

THE CASE FOR REFORM

1. All of the assumptions/aims/needs are met.

2. The purposes of the various Land Acts from 1892 are fulfilled.

3. The unified approach to state land and private land gives consistency to the law and certainty.

4. Removes AMF rights for rivers over 3 metres, with a possibility of not confiscating AMF land but requiring limited access over it to give fairness.

5. Removes the distinction between tidal and non-tidal rivers. Care must be taken to ensure that with tidal rivers existing public rights are not reduced due to a narrow width definition.

6. Removes the concept of navigability.

7. Gives a readiness of definition and a certainty of access that previously did not exist enabling everybody to know exactly what the legal position is and what rights can be enjoyed.

8. Management of waterways and riverbanks, berm lands and floodplains by adjoining owners, Catchment Boards and Crown agencies remains the same. The opportunity is available for the DOC and Catchment Boards to work together in day to day management of riverbeds and marginal strips.

9. Enables rates and rents to be collected from the existing accreted strips that are not reserved or sold.

10. The age old anomalies of definition and the administrative uncertainties and problems of having a fixed land boundary and a mobile water boundary are greatly reduced.

11. Enables many land owners adjoining rivers to be advantaged in being able to have more land.

12. AMF owners with poor land (i.e. unproductive) on riverbanks or in floodplains can take the opportunity to relinquish floodable land and be compensated.

13. Gives the opportunity for hydrological data collection and photogrammetric mapping techniques to be used (at least for the main rivers) to produce definitive status maps which can be published.

FIGURE 1

TYPES OF LAND OWNERSHIP

A Ownership to river bank has right to claim accretion. Can prevent access.

B A.M.F. ownership. Owns but river portion not in fee simple. Can prevent access.

C Fixed landward boundary. Crown owns accretion. Can't prevent access.

D Strip follows river bank. Can't prevent access.

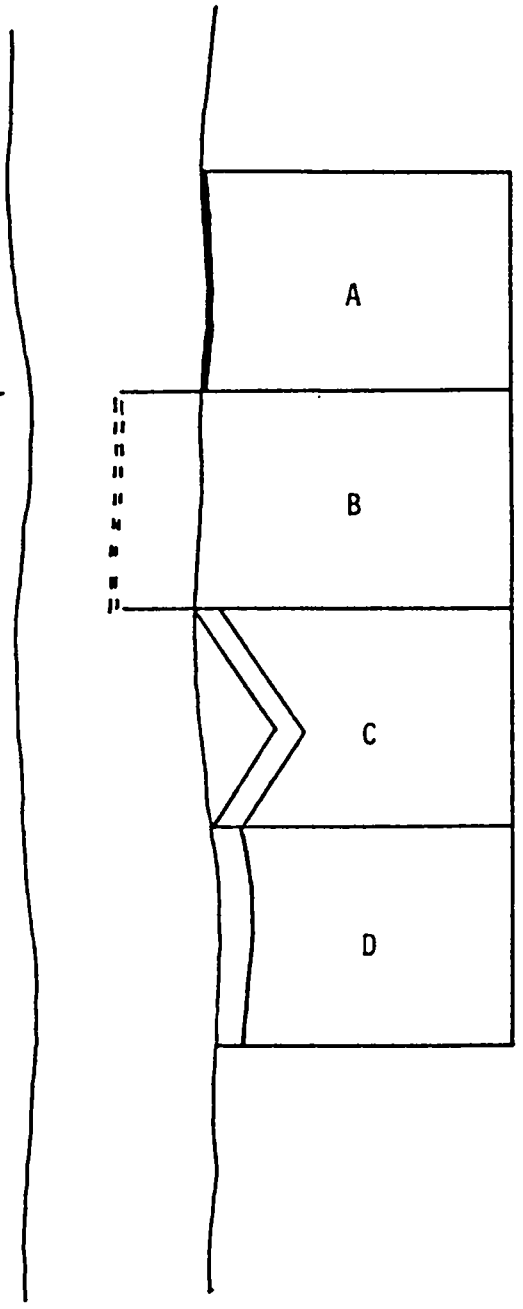


FIGURE 2

AFTER MARGINAL STRIPS CREATED WITH FIXED LANDWARD BOUNDARY OF PRESENT S 58 STRIP

A and B

1. Right to claim accretion lost.
2. Right to prevent access lost.
3. Statutory right to use and manage.
4. Compensation for loss.

1. Right of ownership lost.
2. Right to prevent access lost.
3. Statutory right to use and manage.
4. Compensation.

C

No change.
Has obligation to manage.
May purchase or lease area

D

No change.
Obligation to manage.

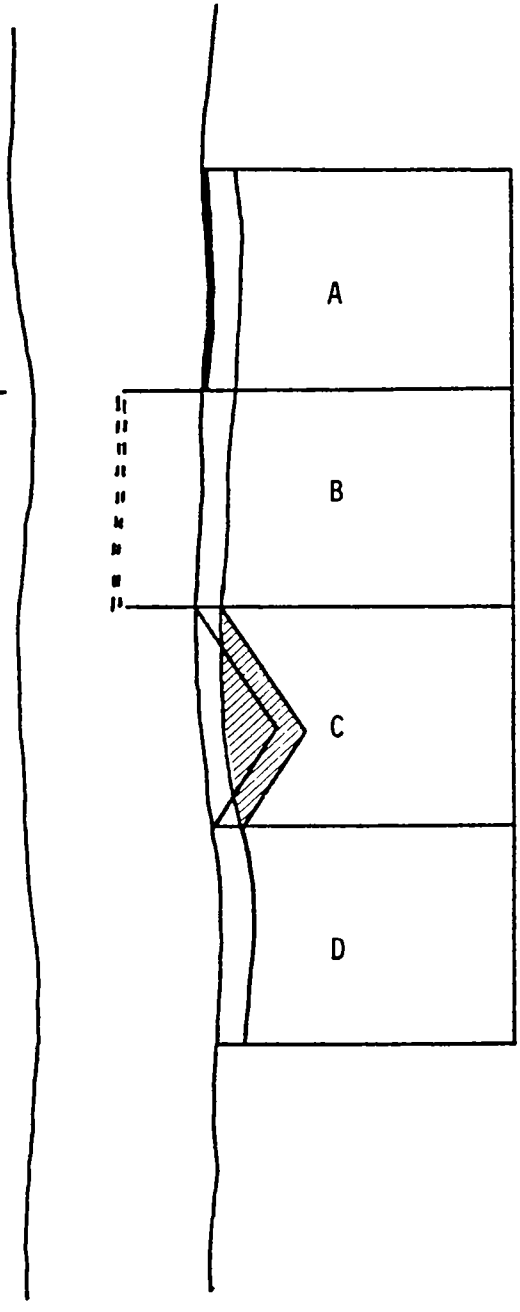


FIGURE 3

EROSION BEFORE REFORM

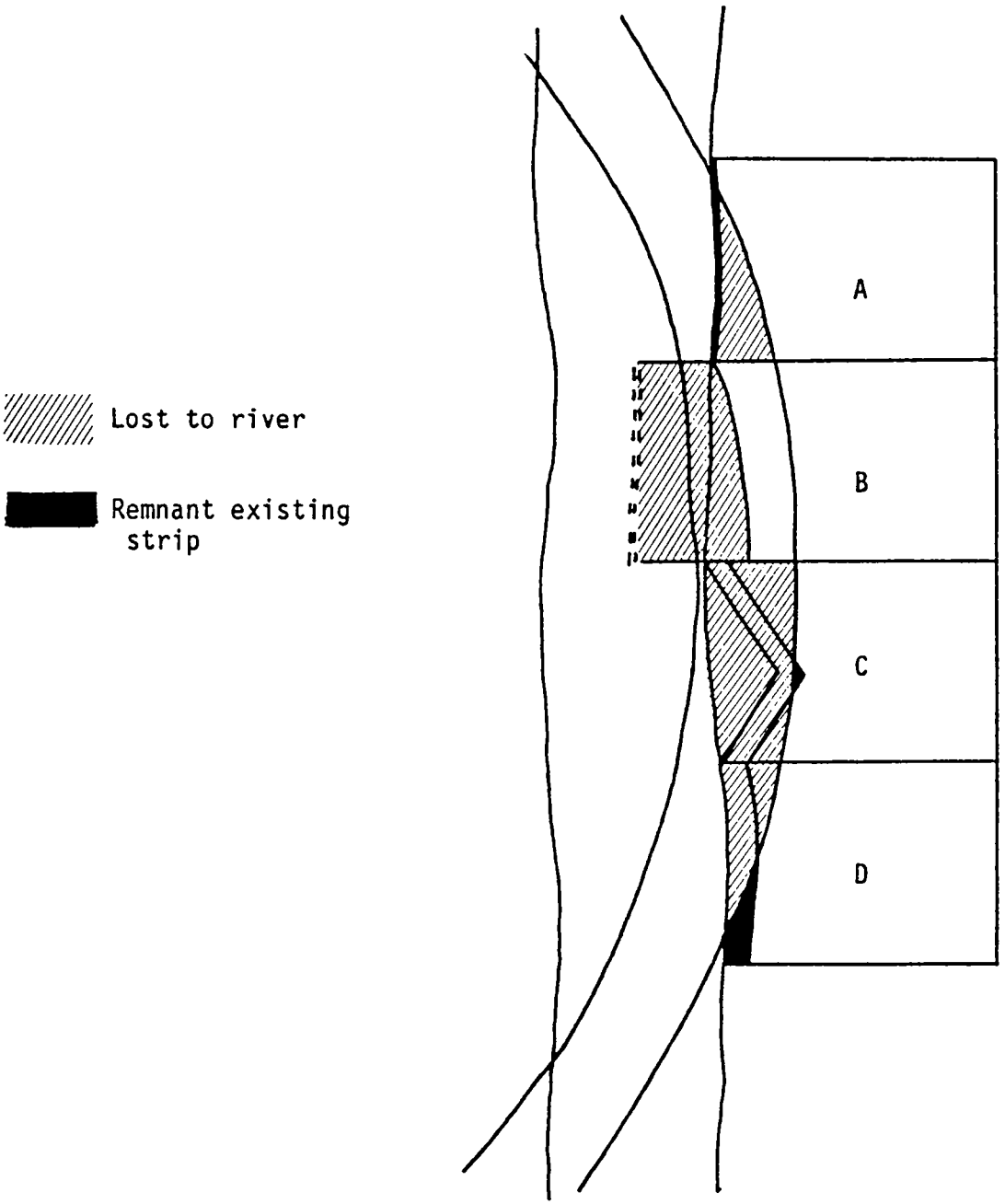


FIGURE 4

EROSION AFTER REFORM

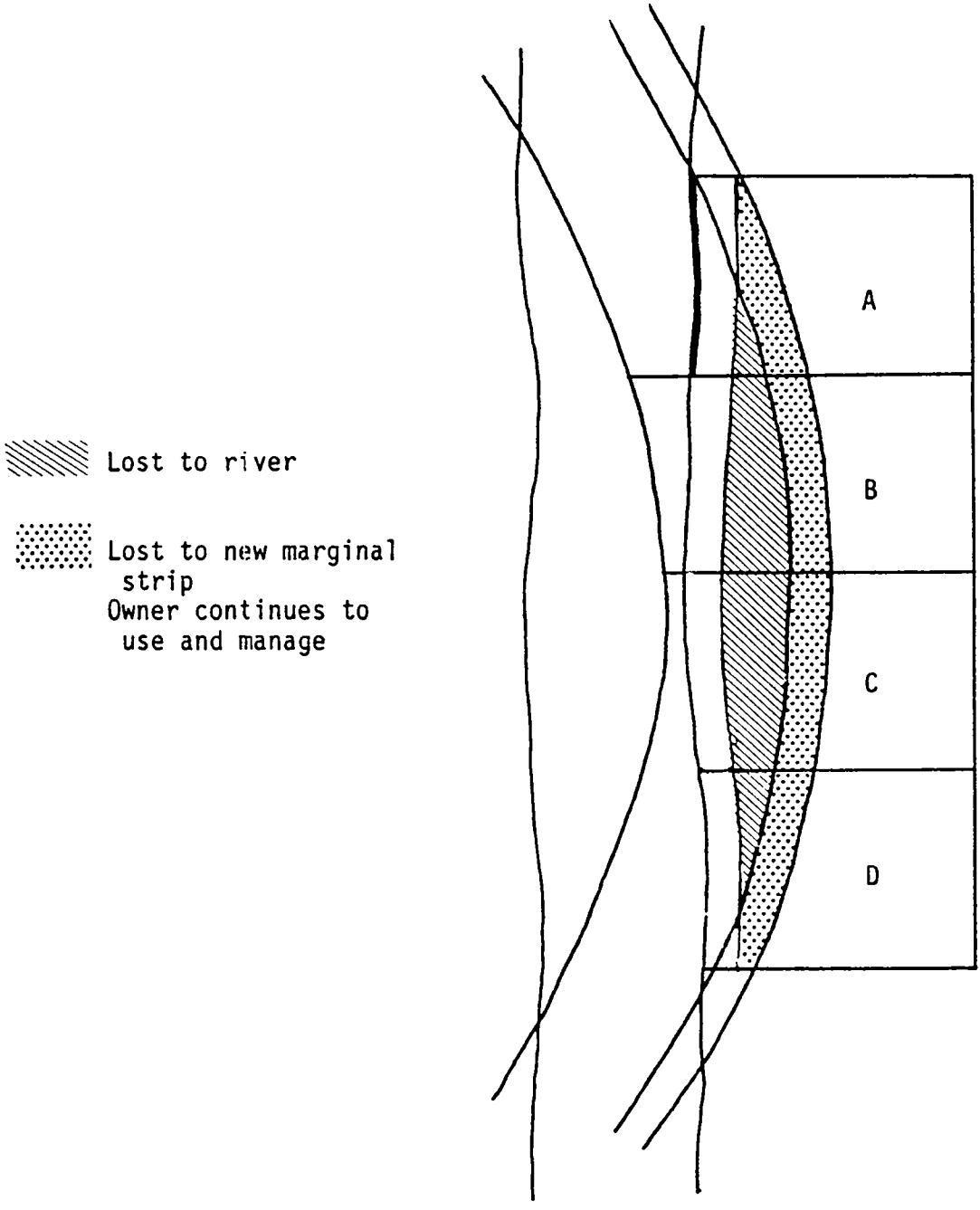


FIGURE 5

ACCRETION BEFORE REFORM

A Adjoining owner could claim accretion.

B Adjoining owner has ownership but not fee simple.

C Accretion to S 58 strip.

D Accretion to strip.

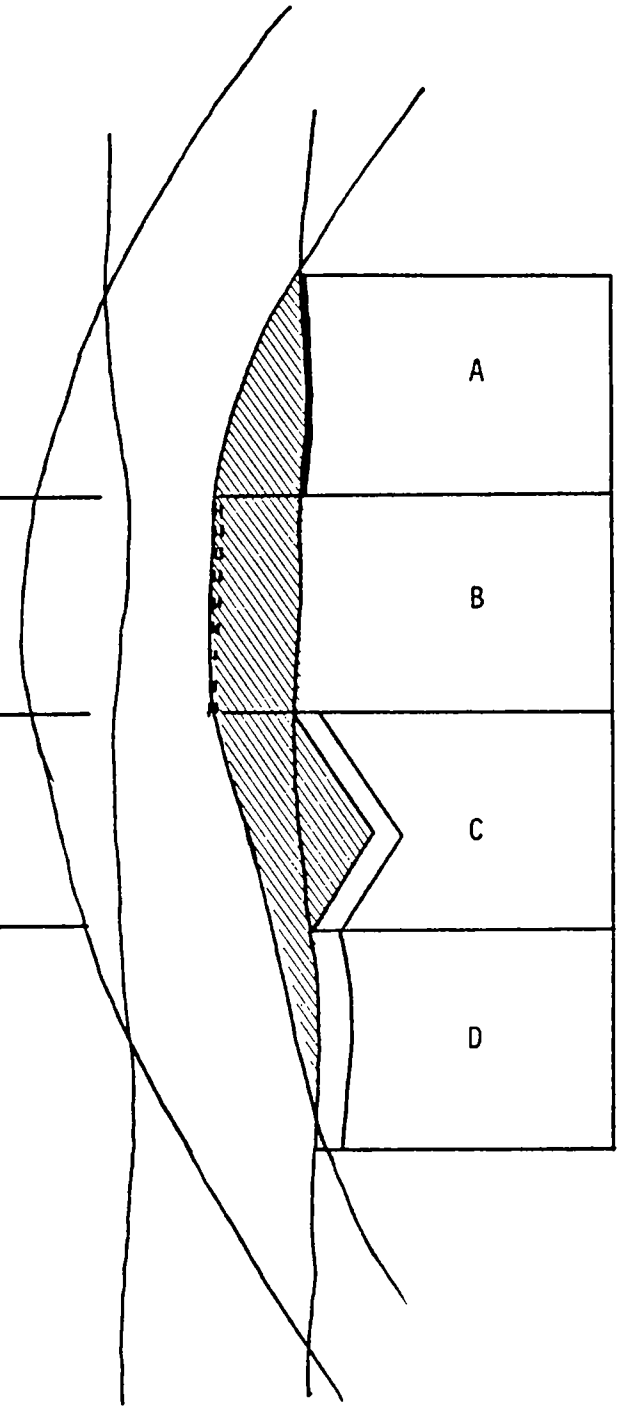


FIGURE 6

ACCRETION AFTER REFORM

1. D.O.C. has first right to take.
2. If not taken adjoining owner can purchase or lease.
3. Adjoining owner manages to riverbed.

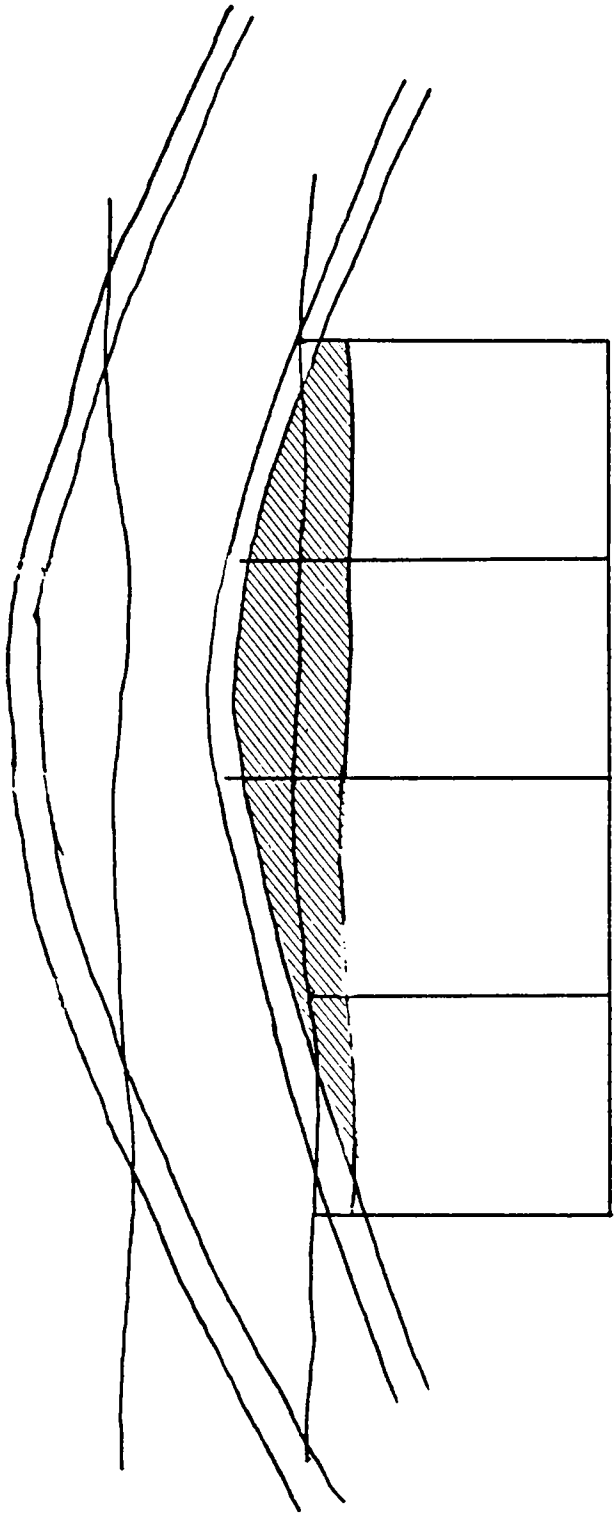


FIGURE 7

RETAINING A.M.F. AND FIXED LANDWARD BOUNDARIES TO S 58 STRIPS

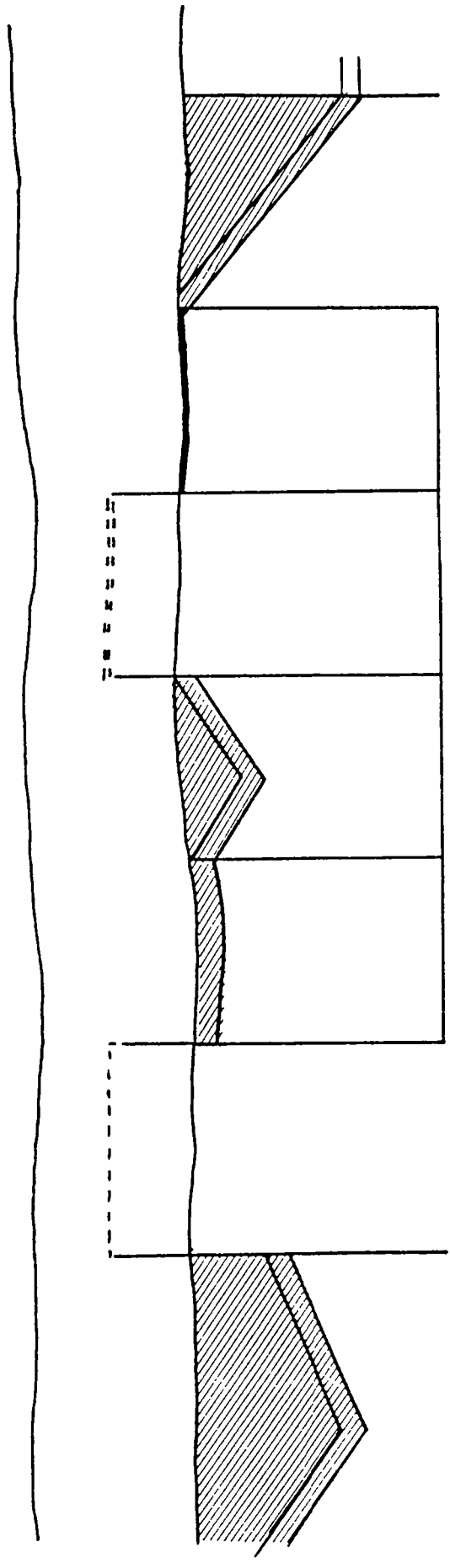


FIGURE 8

ABOLISHING A.M.F., CREATING NEW STRIPS AND RETAINING FIXED LANDWARD BOUNDARIES TO S 58 STRIPS

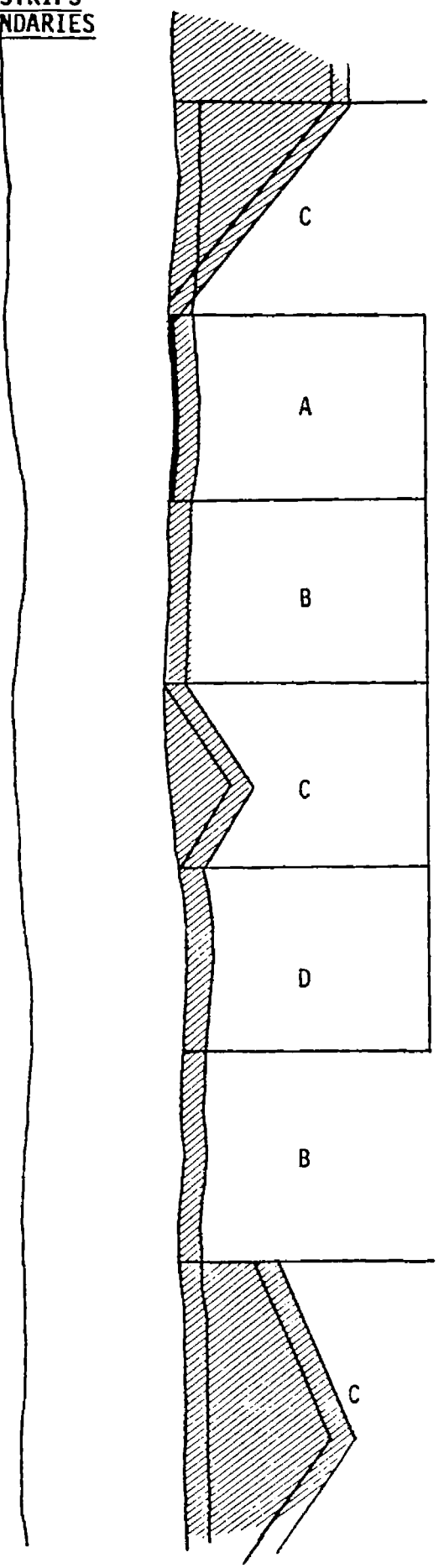
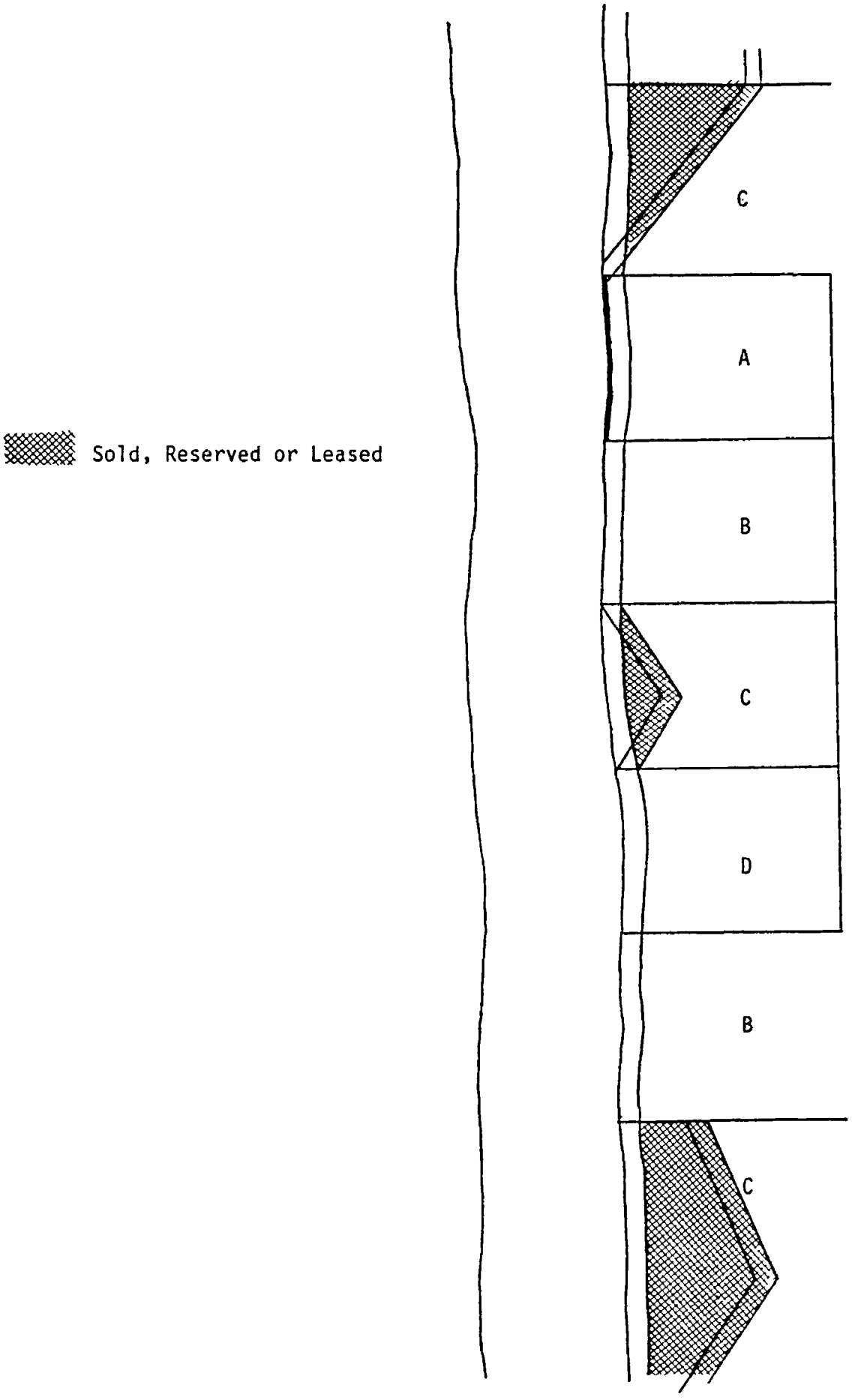
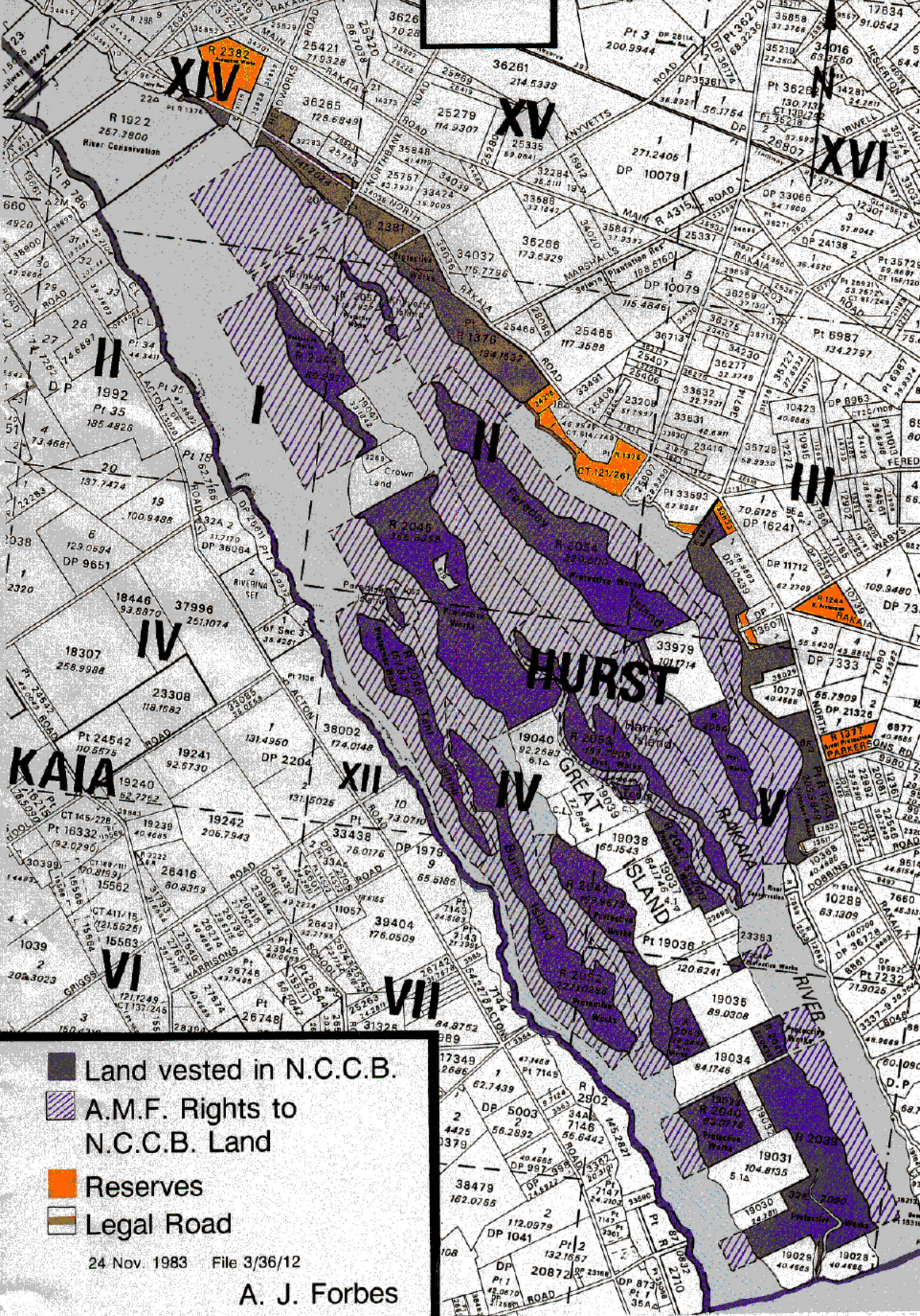


FIGURE 9

ABOLISHING A.M.F., CREATING NEW STRIPS, SELLING LEASING OR RESERVING ACCRETION, S 58 STRIPS




HURST
KAIA
I
II
III
IV
V
VI
VII
XII
XIV
XV
XVI
Land vested in N.C.C.B.
A.M.F. Rights to N.C.C.B. Land
Reserves
Legal Road
24 Nov. 1983 File 3/36/12
A. J. Forbes

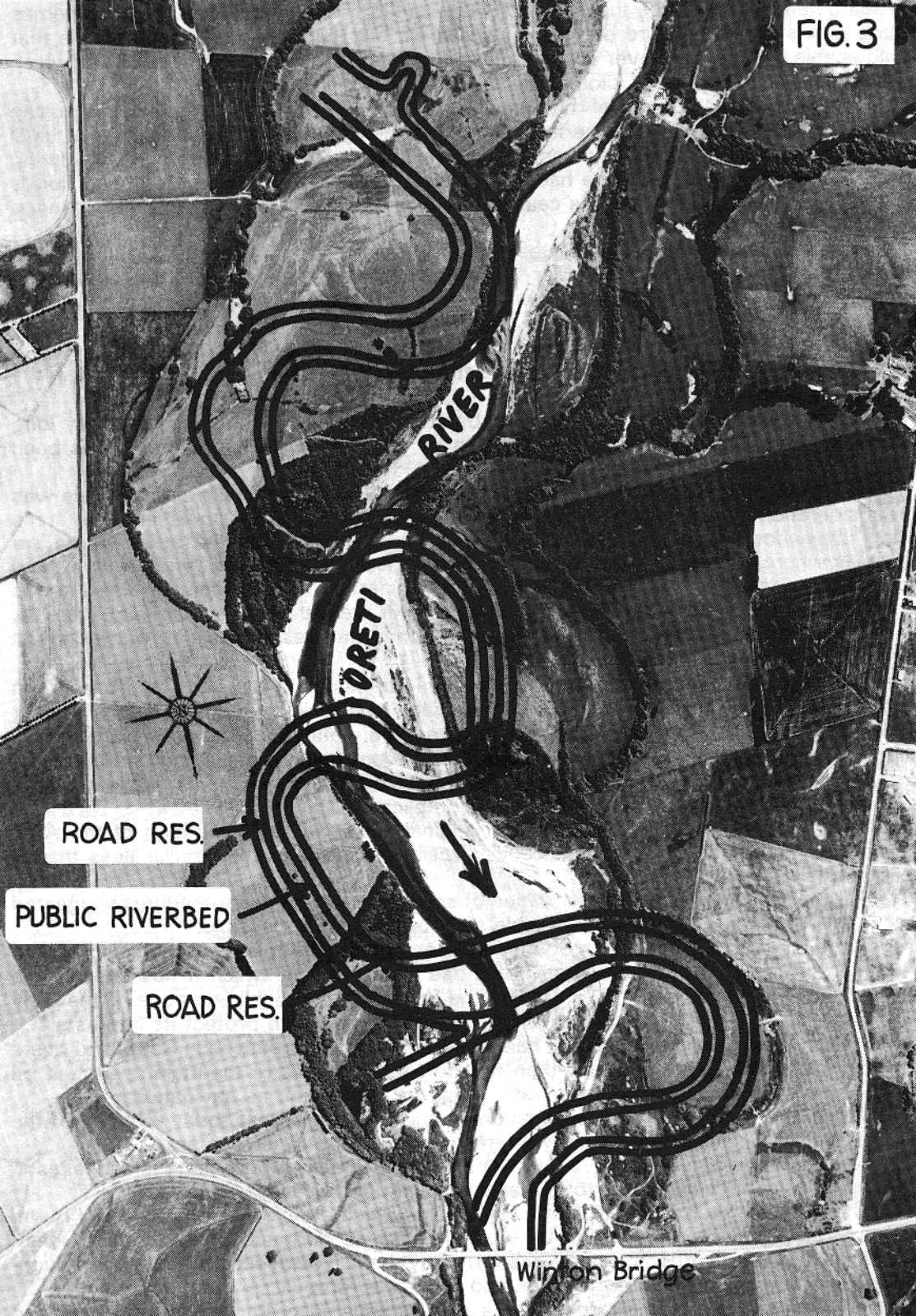


FIG. 3
ÖRETI RIVER
ROAD RES.
PUBLIC RIVERBED
ROAD RES.
Winton Bridge

DEPARTMENT OF CONSERVATION

LICENCE TO OCCUPY

WHEREAS THE DIRECTOR-GENERAL OF CONSERVATION acting for and on behalf of HER MAJESTY THE QUEEN (hereinafter referred to as "the Licensor") has pursuant to Section 53 of the Conservation Act 1987 authorised a licence to be issued to DAVID CRAIG GUNN of Lake Taylor, Hawarden (hereinafter referred to as "the Licensee") over that area containing 887ha more or less situated in Canterbury Region and being (legal description) Part Reserve 4431 and Rural Section 41280, Blocks I, V, IX, X, and XIV of Mytholm Survey District as the same is more particularly outlined on the plan attached hereto (hereinafter referred to as "the said land").

NOW THEREFORE the Licensor doth hereby licence and authorise the Licensee to occupy the land described herein for a term of five (5) years commencing on the first day of January 1989.
SUBJECT to the payment of a period rental of three thousand six hundred and sixty three dollars ($3663.00) for the first three (3) years of the said term payable in advance on the first day of January in each and every year, and thereafter a rental payable as aforesaid, as provided in paragraph 2(b).

AND ALSO SUBJECT TO the conditions hereinafter set out:

1. (a) THAT the Licensee shall use the said land solely for the purpose of grazing cattle and if at any time the Licensor is of the opinion that the said land is not being used or is not being sufficiently used for that purpose or if the Licensor considers that the continued use of the land is detrimental to Conservation values of any kind whatsoever then the Licensor may terminate this Licence on such terms as the Licensor thinks fit or may require the licensee to remove all stock from the said land for such period as the Licensor thinks fit PROVIDED THAT if any such period exceeds one month the rental shall abate pro-rata.

   (b) THAT the Licensee shall graze only the type and number of stock on the land as are specified in the schedule hereto and notwithstanding the type and number of stock specified shall not at any time overstock the land.

2. (a) THAT the Licensee will at all times pay punctually the rental as hereinbefore provided.

(b) THAT the rental hereinbefore specified shall be reviewed by the Licensor after the first three (3) years throughout the term of the Licence, such reviewed rental to be the market price then prevailing and the Licensee hereby undertakes to pay in the same manner as aforesaid any such reviewed rental.

3. THAT the Licensee shall not damage or destroy any natural, scenic, historic, cultural, archaeological, biological, geological or other scientific features or indigenous flora and fauna on the said land.

4. THAT the Public shall at all times have access on foot to all parts of the said land.

5. THAT the Licensee will not assign, sublet, mortgage, charge, grant any lien, or otherwise dispose or part with possession of the whole or any part of the said land.

6. THAT the Licensee will use and manage the said land in a good and husbandlike manner and not impoverish or waste the soil thereof.

7. THAT the Licensee will keep the said land free from gorse, broom, noxious plants, rabbits and other vermin.

8. THAT the Licensee will not break up or crop any part of the said land, nor cut down any trees or bush, nor take or remove any plant, without the prior consent of the Licensor.

9. THAT the Licensee will not erect or remove any buildings or fences or structures on the said land without the prior consent of the Licensor.

10. THAT the Licensee will keep all buildings, fences, gates, drains and other improvements now or hereafter upon the said land in good order, condition and repair.

11. THAT the Licensee will pay all rates and other charges which may be lawfully imposed on him as occupier of the said land.

12. THAT the Licensee shall have no right to any mineral on or under the said land and shall not work or use any such mineral without the prior consent of the Licensor.

13. THAT the Licensee shall ensure that full and proper precautions are taken to safeguard the said land against fire.

14. THAT the Licensee shall ensure that all stock grazed or otherwise held on the land is contained within the land, and where such stock has for any reason strayed into, trespassed upon, or otherwise entered into any other Conservation Area without the Licensor's authority, the Licensee shall cause all such stock to be forthwith removed from such Conservation Area.

15. THAT the Licensor shall not be called upon at any time to contribute to the costs of any boundary fencing between the said land and any adjoining land of the Licensee.

16. THAT the Licensee shall not graze nor permit to be grazed on the said land any bull or other animal likely to be dangerous to any person entering upon the said land.

17. THAT the Licensee will at all times act in accordance with the provisions of any management plan of the said land and shall not by any act, omission or default contravene any such plan.

18. THAT the right is reserved for agents and servants of the Licensor to enter upon the said land at any time for the purpose of inspecting the said land.

19. THAT in the event of the Licensee wishing to surrender this licence during the currency of the term such surrender may be accepted by the Licensor on such conditions as the Licensor may deem appropriate including a condition that the Licensee shall be required to bear and pay any local body rates payable under the licence from the date of acceptance of the surrender until the date at which the license would have expired had the surrender not been accepted or at the end of the rating period whichever is the sooner.

SPECIAL CONDITIONS

AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. IN the event of a breach of any of the conditions of this licence or in the event of the whole or any portion of the said land being required for any Conservation or reservation purpose or any other purpose whatsoever this licence may be determined at any time in respect of the whole or any other purpose whatsoever of the said land by the Licensor giving to the Licensee one calendar months notice in writing his intention so to determine this licence.

   PROVIDED THAT where the licence is determined as to part of the said land only the Licensor shall make such adjustment to the rental payable as he shall in his description deem fit and proper.

2. UPON the expiration or sooner determination of this licence either as to the whole or any part of the said land the Licensee shall not be entitled to compensation for any improvement effected by him but he may within such time as the Licensor shall determine remove from the said land all buildings, enclosures, fencing, or other improvements effected or purchased by him.

AND it is hereby declared that this licence is intended to take effect as a licence only under Section 53 of the Conservation Act 1987 and the provisions of that act applicable to such licences shall apply to these presents.

Dated the 30th day of March 1989

SCHEDULE

Type of Stock	Number
Hereford Cattle	No more than 200 head at any one time

The Licensee will be responsible for erecting and/or maintaining a stock barrier in the Jollie Brook and must take any action the Regional manager requests to ensure that stock are contained in the licenced are (see plan attached).

SIGNED for and on behalf of the Licensor by the Regional Manager for the Canterbury Region, Department of Conservation

Regional Manager

in the presence of:

Witness: _____

Occupation: _____

Address: _____

_____

_____

_____