Conservation Land and the Social Covenant

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Summary

- A review of the legislation shows that mining enjoys a uniquely privileged position in securing access to Crown-owned conservation lands. While all other sectors must seek concessions under the Conservation Act 1987, mining companies can secure much less stringent "access arrangements" under the Crown Minerals Act 1991.

- The 1997 amendments to the Crown Minerals Act established Schedule 4 to protect high-value landscapes and ecosystems from any mining development, but gave the Ministers of Energy and Conservation the power to delete any areas they wish by Order in Council. Public consultation was required, but with no judicial or parliamentary checks on the final decision. The public was obliged to trust ministers to act in good faith.

- Once the principle of protection ceases to be absolute (subject only to the will of Parliament) and instead becomes contingent on the goodwill of two ministers, the potential must always be there for an unraveling of the social compact around national parks, nature reserves, and other iconic areas of the country. An amendment to require any deletions from the schedule to be voted on by Parliament would now be necessary to restore public trust that the country's prime conservation areas will not be opened up for mining in response to special-interest lobbying.

- The essence of protected status lies in the obstacles to its revocation. Deletions from Schedule 4 are completely different from additions and must not be confused with them or treated as some sort of tradeoff. Additions to the schedule carry no implication that the status of already-protected areas is being changed. Deletions, on the contrary, carry precisely that implication.

- Perceived breaches of trust have potentially chilling effects on economic activities in various related sectors of the economy – in particular tourism and New Zealand's "clean green" and "100% pure" branding in export markets.

- The practice of placing a legal/administrative ring-fence around the highest-valued areas is a common international response to the impossibility of conclusively balancing quantifiable economic gains from development against largely unquantifiable environment costs. Providing absolute protection for key areas is an economically efficient way to resolve what would otherwise become bitterly disputed development proposals.

- The original legislative proposal to ban mining in parts of the conservation estate was put forward by the then Labour Government in 1990. The primary aim was to provide regulatory certainty that mining would not be permitted in these areas. When finally legislated in 1997, albeit in watered-down form, the Schedule 4 arrangement had multi-party support and was effectively a social covenant to provide durable protection.

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1. Legislation

The Conservation Act 1987 created the Department of Conservation, which has the following functions:

> **6 Functions of Department**
>
> The functions of the Department are to administer this Act and the enactments specified in Schedule 1 to this Act, and, subject to this Act and those enactments and to the directions (if any) of the Minister,—
>
> (a) To manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:
> (ab) To preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats:
> (b) To advocate the conservation of natural and historic resources generally:
> (c) To promote the benefits to present and future generations of—
> (i) The conservation of natural and historic resources generally and the natural and historic resources of New Zealand in particular; and
> (ii) The conservation of the natural and historic resources of New Zealand's subantarctic islands and, consistently with all relevant international agreements, of the Ross Dependency and Antarctica generally; and
> (iii) International cooperation on matters relating to conservation:
> (d) To prepare, provide, disseminate, promote, and publicise educational and promotional material relating to conservation:
> (e) To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism:
> (f) To advise the Minister on matters relating to any of those functions or to conservation generally:
> (g) Every other function conferred on it by any other enactment.

Under section 6(a) the Department currently manages roughly 40% of the land area of New Zealand, with a presumption that the primary use for that land is to be conservation.

The Minister of Conservation has power under section 17Q of the Conservation Act to grant "concessions" for commercial activities other than mining to locate within the conservation estate, subject to tests set out in section 17U.

First, under s.17U(1),

> In considering any application for a concession, the Minister shall have regard to the following matters:
> (a) The nature of the activity and the type of structure or facility (if any) proposed to be constructed:
> (b) The effects of the activity, structure, or facility:

> (c) Any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity:
> (d) Any information received by the Minister under section 17S or section 17T of this Act:
> (e) Any relevant environmental impact assessment, including any audit or review:
> (f) Any relevant oral or written submissions received as a result of any relevant public notice issued under section 49 of this Act:
> (g) Any relevant information which may be withheld from any person in accordance with the Official Information Act 1982 or the Privacy Act 1993.

Then there is a clear instruction to the Minister in section 17U(3)):

> The Minister shall not grant an application for a concession if the proposed activity is contrary to the provisions of this Act or the purposes for which the land concerned is held.

Various other tests and limitations are spelled out in the remainder of s.17U, the combined effect of which it to ensure that the special status of conservation land is fully protected when private commercial activities are granted concessions.

Section 17O(3) of the Conservation Act, however, exempts mining from these provisions of the Conservation Act:

> (3) A concession is not required in respect of—
> (a) Any mining activity authorised under the Crown Minerals Act 1991 (including the transitional provisions of that Act)

Section 61(1) of the Crown Minerals Act 1991 instead provides for much looser "access arrangements" under which use of Crown land for mining purposes can be granted by "the appropriate Minister" to any areas other than those listed in Schedule 4 to the Act.

Section 61(2) of the Crown Minerals Act sets out the relevant matters to be considered in granting access arrangements for mining in non-Schedule-4 conservation lands:

> 61(2) In considering whether to agree to an access arrangement in respect of Crown land, the appropriate Minister shall have regard to—
> (a) The objectives of any Act under which the land is administered; and
> (b) Any purpose for which the land is held by the Crown; and
> (c) Any policy statement or management plan of the Crown in relation to the land; and
> (d) The safeguards against any potential adverse effects of carrying out the proposed programme of work; and
> (e) Such other matters as the appropriate Minister considers relevant.

These are conspicuously less demanding tests than those to be met by activities seeking concessions under the Conservation Act (reproduced earlier). No mention is

made of public notice and submissions, environmental impact statements, the effects of the activity, or "measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects". There is no provision to parallel s.17(U)(3) of the Conservation Act, strictly preventing the Minister from granting an application for a concession if the activity is "contrary … to the purposes for which the land concerned is held".

The distinction between concessions and access arrangements is important. "Concessions" under the Conservation Act include leases, licences, permits or easements, all requiring documentation. "Access" under the Crown Minerals Act is a far looser and more informal concept:

> **Access arrangement** and **arrangement** means an arrangement between a person desiring access to land for the purpose of carrying out mineral related activities and the owner and occupier of the land, permitting such access, either entered into by way of agreement or determined by an arbitrator in accordance with this Act

Mining, therefore, has a uniquely privileged legislative status among activities seeking access to the conservation estate.[1]

2. Economic Efficiency and Regulatory Certainty

The existing legislative framework presents mining companies with a three-tier classification of the country:

- 60% outside the conservation estate requiring approval from the Minister of Energy (with some further restrictions in the case of Maori land);
- 40% in the conservation estate requiring approval from the Minister of Conservation; and
- Schedule 4 within the conservation estate, barred from mining.

This three-fold classification may seem rough-and-ready, but is an effective way of dealing with the difficult issues that arise when attempting to assess the economic gains from mining development versus the environmental losses. The gains from mining are relatively straightforward to quantify, whereas losses to environmental values are inherently difficult to measure and are usually treated in qualitative terms. An important part of the evaluation of environmental values is expressed through the democratic political process since many of the existence and other values of natural systems and landscapes are subjectively experienced by the population as a source of well-being, separately from their monetary income and expenditures, and find clear expression through political actions.

Mining *per se* is in the first instance just another economic activity that stands alongside other components of the country's GDP. In some parts of the country, mining does not compete with other value-creating activities and does not encroach

[1] Tourism, as a non-consumptive use that is compatible with preservation of wilderness values, is explicitly allowed under the Conservation Act 1987. All other activities must seek special access, and it is relative to these that mining's privileges are "unique".

on landscapes or natural systems to which a high value is attributed by the public. In those areas it is reasonable for mining projects to face only the land-use regulatory procedures faced by other sectors. At the other end of the spectrum of natural values, however, there will be areas which the public values so highly for their natural characteristics that environmentally destructive activities, including mining, can be ruled out without engaging in time-consuming and expensive procedures of inquiry and adjudication between competing claims.

Economic efficiency requires, among other things, the minimisation of transaction costs so far as possible. In the case of areas of very high natural value, it is not efficient to allow continual battles between the competing interests, both because the issue of "development" versus "conservation" is inherently impossible to resolve except by exercise of judgment (usually with an arbitrary component[2]); and because such battles have negative spillover effects. Extractive industries as a whole face the chilling effect of aroused public hostility, while the threat of major impacts on high-value landscapes and ecosystems has an equally chilling effect on tourism and aggrieves affected communities.

In most western democracies, legislation has been enacted to enable low-value areas to be developed by extractive industries, while removing the highest-valued areas from all developments[3] and then providing some intermediate areas in which commercial and non-commercial values must be balanced by a formal process. This administrative solution to the dilemma of how to proceed in the situation where, because of missing markets, standard cost-benefit techniques fail, is an efficient (transaction-cost-minimising) approach. Its viability hinges, however, on the integrity of landscape and ecosystem protection at the high-value end of the spectrum. Any perception that the boundaries of Schedule 4 are open to "gaming" by industry lobbyists directly damages the integrity of the entire system of classification of land according to its inherent environmental values.

The key "missing markets" whose absence can distort land allocation decisions guided only by market forces are those for the inherent values which the population at large places upon natural systems and landscapes. As a classic paper by Krutilla puts it, [4]

> The central issue seems to be the problem of providing for the present and future the amenities associated with unspoiled natural environments, for which the market fails to make adequate provision….
>
> When the existence of a grand scenic wonder or a unique and fragile ecosystem is involved, its preservation and continued availability are a significant part of the real income of many individuals….. One may ask why

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2 That there is an inescapably arbitrary element in most environmental valuation is well understood in the economics literature; see for example Nick Hanley, Bengt Kristrom, and Jason F. Shogren, "Coherent Arbitrariness: On Value Uncertainty for Environmental Goods", *Land Economics* 85(1): 41-50, February 2009.

3 That is, uses which gain value from the natural environment without degrading or depleting it. Tourism, recreation and observational science are examples of non-consumptive use.

4 John V. Krutilla, "Conservation Reconsidered", *American Economic Review* Volume 57, Issue 4 (Sep., *1967*), 777-786, pp.778, 779, 780.

> no market has developed where option value exists for the preservation of natural environments.

Krutilla's answer was that the environment is a public good whose value to the community cannot be captured by the market mechanism, but must be protected by administrative means. Of these the simplest and most reliable is the reservation of certain landscapes and ecosystems to place them outside the reach of those types of economic activity that would diminish their inherent value. This idea lay behind passage in 1964 of the US Wilderness Act, which set aside 9.1 million acres of federal lands as wilderness, defined as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and community of life are untrammeled by man, where man himself is a visitor who does not remain.

Clearly, outside the highest-value areas reserved as wilderness there remained vast area of US federal lands in which a balance has had to be struck between development and conservation, and there has developed a large economic literature on the estimation of non-market values attached to undeveloped lands and natural systems[5]. An important conclusion from that literature is that, generally speaking, the limited methods available (contingent valuation, hedonic valuation, travel-cost and so on) are able to capture only a part of the existence and option values of natural systems, providing lower-bound figures rather than accurate estimates. Even those lower-bound estimates are expensive to produce. Hence a straightforward cost-minimising policy approach in the most obviously difficult and contentious cases is to use administrative decisions to bar "development" from areas where it is clear that the inherent non-market values of the unaltered environment are very large, even if a precise numerical value cannot be assigned to them.

From an economic point of view, the point of the social compact embodied in Schedule 4 of the Crown Minerals Act is to forestall wasteful expenditure of scarce resources on disputes and hearings in parts of the country where especially large non-quantifiable existence, option and bequest values are at stake. Ring-fencing highly valued areas is an efficient way to short-circuit the difficult process of balancing gains against losses.

Because the issue is inherently and inescapably political, resting upon values held subjectively by the public at large, there always remains a reserve power for the public (as represented by Parliament) to revisit the protected status of a national park, or nature reserve, or other protected area. It follows that once an area of outstanding natural beauty or high ecological importance has been identified as such, and given

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[5] See, for example, Vernon L. Smith, "Economics of Wilderness Resources", California Institute of Technology Social Science Working Paper 84, May 1975; Richard G. Walsh, John B. Loomis and Richard A. Gillman, "Valuing Option, Existence and Bequest Demands for Wilderness", *Land Economics* 60(1): 14-29, February 1984; John B. Loomis and Robert Richardson, "Economic Values of the US Wilerness System: Research Evidence to Date and Questions for the Future", *International Journal of Wilderness*7(1): 31-34, April 2001; Ray Rasker, "An Exploration into the Economic Impact of Industrial Development versus Conservation in Western Public Lands", *Society and Natural Resources* 19(3): 191-207, 2006

protected status, there is a strong argument for that status to remain inviolate unless Parliament determines otherwise. If the protection accorded is of a lower standard than this – for example, able to be overturned by executive decision of the Government of the day - the benefits of avoiding the transaction costs associated with previous bitter political battles over mining in the conservation estate are inevitably sacrificed to some extent.

This highlights a major potential deficiency in the provisions for "amending" Schedule 4 of the Crown Minerals Act 1991. Section 61(4) of the Act empowers the Ministers of Conservation and Energy to amend the schedule by Order in Council, following a process of public consultation "to the extent that is reasonably practical" and with no criteria stated against which proposed amendments are to be evaluated, nor any provision for judicial review of the ministers' decisions.

Amendments may comprise additions to the schedule, deletions from it, or both. The legislation recognizes no distinction between additions and deletions. But from the standpoint of economic efficiency, and the sustainability of the legislation itself, it is deletions that are the critical amendments.

Additions to the schedule carry no implication that the status of already-protected areas is being changed. Deletions, on the contrary, carry precisely that implication, since they involve breaching the sacrosanct status of protected areas. The Crown Minerals Act places very few checks and balances around the power of the two ministers unilaterally to delete areas from protected status in response to pressures from, e.g., mining interests. With few formal checks on the exercise of executive power, public trust is an essential component in sustaining protected status.

Public trust in the government of the day to act fairly and in good faith in resisting requests from mining companies to be given access to Schedule 4 lands is important as part of the general framework of property rights and contracts within which the economy operates. Perceived breaches of trust have potentially chilling effects on economic activities in various related sectors of the economy – including tourism and New Zealand's branding in export markets.

The existence of the power to delete areas from Schedule 4 at the discretion of ministers, without parliamentary oversight, opens the way to rent seeking and regulatory capture by mining interests while raising difficult issues about the sanctity and status of national parks as a category. National parks, once established, are presumptively of sufficient conservation value to be included in Schedule 4 as a matter of course (though in 2008 the addition of Kahurangi and Rakiura National Parks to Schedule 4 was done by explicit Order in Council). The Crown Minerals Act provisions for amendment, however, leave open the way to piecemeal dismemberment of national parks if mining activities are allowed.

Such encroachment at the margin, however small, tends to act as a signal that nothing is sacred, and thereby to reignite the social and political tensions (and associated wasteful diversion of scarce resources into lobbying) that establishment of Schedule 4 was intended to calm. Once the principle of protection ceases to be absolute (subject only to the will of Parliament) and instead becomes contingent on the goodwill of two

ministers, the potential must always be there for an unraveling of the social covenant around national parks, nature reserves, and other iconic areas of the country.

This suggests that an amendment to the Crown Minerals Act may be called for to toughen the criteria for deletions from Schedule 4, preferably by requiring clear public justification and parliamentary sanction for any deletions.

The next section reviews the legislative history.

3. History

The context in which the conservation estate was established was the decision by the Government in 1985 to break up the Crown lands managed since 1914 by the New Zealand Forest Service. The goal was to separate the management of the Crown's large areas of commercial production forests from the remainder, which were to be withdrawn from commercial use for timber production and similar extractive pursuits and placed under Department of Conservation's management. The view at the time was that the criteria that should guide conservation management were sufficiently different from those applicable to commercial land use to warrant the establishment of a separate government department, with an explicit mandate to protect land rich in non-market values.

In New Zealand as in the USA, lands held by the government include some areas of outstanding natural value alongside large areas where the inherent value is low enough to make other economic uses acceptable. Striking a balance between the measurable economic gains from commercial development and the unmeasurable (non-quantifiable) loss of natural values in the process of development is time-consuming and difficult, placing heavy cost burdens upon all parties (as the history of the RMA, and the debates over mining in the Coromandel during the 1980 and 1990s, make clear). Those costs inevitably increase with the scale of the natural values at stake, as public concern (expressed through submissions, litigation, and political activity) increases.

Taking account of the uncertainties involved, and given the benefits of regulatory certainty, an economically efficient (least-cost) administrative solution is to classify the conservation estate into areas of progressively higher inherent value, to place a boundary around the highest-value category, and to ban extractive economic activities within that boundary. This in essence is the origin of Schedule 4 of the Crown Minerals Act.

In November 1990 the then Minister of Conservation, Phillip Woollaston, introduced the Protected Areas (Prohibition on Mining) Bill to[6]

> "prohibit mining in certain categories of protected areas of land managed by the Crown. Those areas are national parks…, national reserves and nature reserves under the Reserves Act, wilderness areas under either the Reserves Act or the Conservation Act, and sanctuary areas and ecological areas under

[6] *Hansard* Vol.510, 4 September 1990, p.4226.

> the Conservation Act. There is also provision for additional areas to be brought under the legislation by Order in Council, made on the joint advice of the Minister of Conservation and the Minister of Energy.

The stated aim was to remove any previous presumption that mining would be permitted in these areas, and thus to provide certainty for all parties. As Christine Fletcher later summarized the original motivation,[7]

> The idea was to try to bring some certainty into a very difficult situation of tension between … warring parties, by closing certain protected areas within New Zealand to mining activities so that everyone knew where they were, so that everyone knew where the boundaries were, and so that a great deal of time was not spent on dealing with mineral applications that were not only very costly to all concerned, but also divided communities and, in some cases, families.

An important feature of Woollaston's PAPOM Bill (as it became known) was the asymmetry in its approach to changing the listed areas from which mining was to be banned. The two responsible Ministers were to be able to add land to the list, but not to remove any, by Order in Council. This meant that removal of any area from the list would require a decision by Parliament itself, reflecting the fact that the system of prohibition was explicitly intended to reflect public sentiment.

Under the PAPOM Bill, therefore, an incumbent government would not have been able to reopen any area that had been closed to mining without going back to Parliament for approval. This was consistent with the intent to provide certainty for all parties, and in particular to provide security to local and national communities favouring conservation, who would be relieved of the cost and trouble of maintaining continuous political action to countervail lobbying by mining interests.

The 1990 Bill went to the Planning and Development Select Committee, where it languished for seven years until 1995, when Judith Tizard, with support from National's Christine Fletcher, successfully introduced the Coromandel Hauraki Gulf (Prohibition on Mining) Bill to protect key areas on the Coromandel peninsula.[8] The Planning and Development Select Committee, chaired by Fletcher, reported back to the House in early 1997, recommending that the Coromandel Hauraki Gulf Bill should not proceed but that the 1990 PAPOM Bill should be taken up and enacted as an amendment to the Crown Minerals Act 1991[9]. The Government did so in March 1997 and the resulting Crown Minerals Amendment Bill (No 3) was passed in November 1997 with National, Labour and Alliance support (but strongly opposed by the ACT Party on the basis of arguments closely parallel to those currently advanced by the Government for reopening some of Schedule 4 to mining).[10]

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7 *Hansard* Vol.564, 13 November 1997 p.5398.

8 "Mining Bill Likely to be Backed by Nat MPs", *The Dominion* 4 April 1995 p.2; "Coromandel Mining Bill Under Way", *National Business Review* 23 June 1995 p.3.

9 *Hansard* Vol.559 12 March 1997 pp.850-859.

10 *Hansard* Vol.564 13 November 1997 pp.5391-5406 and Vol.565 19 November 1997 pp.5499-5530.

In the course of deliberations, Jeanette Fitzsimons of the Alliance successfully moved an amendment regarding the mechanism by which the Government Bill proposed to allow Schedule 4 to be amended. In the 1990 PAPOM bill there had been provision for land to be added, but not for land to be deleted, by Order in Council. The 1997 Crown Minerals Amendment (No 3) Bill provided that land could be either added to or deleted from (the word used in section 61(4) is "amend") the new Schedule 4 by Order in Council on the recommendation of the two responsible ministers, without any reference to Parliament. Jeanette Fitzsimons stated her preference for any deletions from the schedule to be treated separately from additions, and to require parliamentary approval, but was forced to settle for a softer alternative negotiated with Max Bradford (then Minister of Energy) which required only that the ministers "must consult to the extent that is reasonably practicable, having regard to all the circumstances of the particular case, those persons the Ministers have reason to believe are representative of interests likely to be substantially affected by the Order in Council or representative of some aspect of the public interest."[11] The amended section places no obligation on the ministers other than to consult; there is no requirement on them to take fully into consideration the matters raised during consultation.

The only area to which an absolute prohibition, not subject to revocation by Order in Council following consultation, applies under the Crown Minerals Act, is the Mercury Islands (s.61(8)).

The social covenant under which Schedule 4 lands are off-limits to mining companies under the 1997 legislation is therefore less stringent than had apparently been intended in 1990 by the Labour Government that created the Department of Conservation. The promised "certainty" about the security of protected land was transformed in the 1997 legislation into the provision that Schedule 4 could not be opened to mining without public consultation and a decision by the Ministers of Conservation and Energy. This is a much lower legal threshold than the usual bans on mining in wilderness areas in other jurisdictions, and places a considerable onus on the relevant Ministers to act in good faith when exercising their powers.

The essence of protected status, after all, lies in the obstacles to its revocation. The existence of procedures for adding to Schedule 4 (as was done in, e.g., the Crown Minerals Act (Schedule 4) Order 2008) should be seen as entirely separate and separable from the procedures for deleting land from the schedule; the second is far more contentious and has far greater social and economic ramifications than the first. This means that the two sets of proposals in the official discussion paper of March 2010 – one to add several areas to Schedule 4, and the other to remove some – have to be treated as separate matters. The proposed additions extend the scope of protected areas, but the deletions radically reduce certainty about the protected status of areas listed under the (imperfect) social covenant.

With no recourse to the courts to enforce protection, those wishing to preserve Schedule 4 from mining encroachment have only the political arena in which to act. This means that decisions on where and whether to allow mining are shifted from a situation of certainty to one of uncertainty – an uncertainty that inevitably increases once actual deletions from Schedule 4 become government policy. The intense

[11] Crown Minerals Act 1991 s.61(5).

political battles that the 1990 PAPOM Bill and the 1997 Crown Minerals Amendment (No 3) Bill were aimed to stop, or at least limit, are again in prospect.

This is important for an economic evaluation of the contribution that mining in Schedule 4 may make to the national economy because the prospect of bitter political contention raises the possibility of changing overseas perceptions of New Zealand's environmental performance. The protected status of wilderness areas is an important component of the country's brand image as a tourism destination.