MITCHELL DAYSH

Memorandum

To: MfE Listed Projects Team

From: Stephen Daysh

Date: 19 June 2024

Re: **Clarification Sought Re Tukituki Water Security Project (Ref FTA#207)**

INTRODUCTION

I refer to the email request from the MfE Listed Projects Team dated 17 June 2024 requesting clarification on the following matters

1. The extent to which this proposed project is the same as, or different to, that applied for and consented as the Ruataniwha Water Storage Scheme? For example,
    a. Is the dam location and height, and reservoir size and extent, as originally proposed or are adjustments proposed?
    b. Is the irrigation footprint approximately the same? You note 'amendments to existing and securing new resource consents for the downstream distribution network, including the delivery of stored water from the Makaroro Dam to Lake Whatuma, the Mangatarata catchment area the lower Heretaunga catchment area' – could you please provide an overview of how this aspect differs to what is currently consented?
    c. Does the application still include the potential to generate 6.5 MW of electricity?

2. The relationship between the Fast-Track applicant - Tukituki Water Security Limited – and the holder of the current resource consents being Water Holdings Hawke's Bay.

3. If possible, it would also be helpful if you are able to provide a copy of the Supreme Court Judgement dated July 2017, in respect of decision-making under the Conservation Act 1987.

Outlined below are answers to these questions.

TUKITUKI WATER SECURITY PROJECT AREA DEFINITION

The wider Tukituki Water Security Project (TWSP) in relation to downstream water conveyance and use has the following differences to the consented the Ruataniwha Water Storage Scheme (RWSS).

- The hierarchy of water use, which prioritises ensuring the health of the river by guaranteeing up to 20Mm^3 of water to ensure the Regional Plan minimum flows are met at all times at the key Tukituki River Red Bridge Water Level Monitoring Site, the important point being these minimum flows are naturally lower in dry years than the Minimum Flow target. This new "environmental flow" from the project will have very substantial ecological benefits for the whole Tukituki River system, especially given the climate change predictions for a drying North Island East Coast.
- Directing water to a new "Zone N" to be used for additional irrigation and environmental remediation projects (over and above the six Offset and Mitigation Projects already provided for in Schedule Six of the RWSS resource consents package) in the Lake Whatuma / Mangatarata Catchment - (see **Appendix A** to see this additional Zone N area).
- The provision of water for local communities where required because of growing water deficits from climate change.
- The opportunity to integrate wider water security for Hawke's Bay by supplementing water in the Southern Heretaunga and TANK catchments, which are currently overallocated (Please refer to plan in **Appendix B** which illustrates this significant new opportunity to supply water into the water-short Hastings industrial, horticulture and municipal supply area).

As a result of these differences, some of the RWSS resource consents will need to be varied, and the irrigation footprint may be smaller – please refer to Plan A attached with the Fast Track Application form for the RWSS Irrigation Demand area.

However, it is also possible that given the advances of technology in irrigation efficiency, the footprint may be similar but directed to higher value land uses in vegetable and seed production, and permanent horticulture rather than livestock farming.

The TWSP uses the same core dam and upstream water intake area and infrastructure and has the same reservoir footprint on the Makaroro River as that consented under the RWSS project.

In this respect, all the current resource consents for the dam and reservoir, along with the head race designation are locked in and do not require any change.

The relevant resource consents are:

- AUTH-120421-02 (LU120370Ca) - Makaroro Dam Structure, Land use consent, water permit, and discharge permit
- AUTH-120423-02 (WP120371Ma) - Makaroro Damming, Take, Diversion and Discharge, Water permit and discharge permit
- AUTH-120425-02 (LU120372Ca) - Upstream Water Intake Structure, Land use consent, water permit, and discharge permit

- AUTH-120427-02 (WP120373Ta) - Upstream Water Intake Diversion and Take, Water permit

For orientation and footprints of this core consented infrastructure which will underpin the TWSP, please refer to Application Plans 2, 3 and 4 in **Appendix C** of this memorandum.

For identification of the approved headrace designation that the TWSP will utilise, please refer to the Table including Map References to the Designation from the Proposed CHBDC District Plan (Operative part of Plan) in **Appendix D.**

HYDRO-ELECTRIC POWER GENERATION

The Tukituki Water Security Project still includes the proposal to generate at least 6.5 MW of hydroelectricity, with this to be confirmed during the project establishment phase.

There is also potential in the headrace canal to install micro-hydroelectric generation to offset distribution pumping costs.

THE RELATIONSHIP BETWEEN TWSP AND WHHB

The application made to be included in Schedule 2a of the Fast Track legislation was in fact a joint application by both the TWSP and WHHB. The format of the on-line application form did not allow me to include both parties as applicants, so therefore I had to include Hugh Ritchie who is a WHHB Director in as an "Additional Contact" on the on-line form. This was an unfortunate constraint in the application process, and we are pleased that there is an opportunity to more fully outline the status of the two parties as Joint Applicants.

As I think is clear WHHB purchased the IP for the RWSS from the Hawke's Bay Regional Investment Company (HBRIC) and this IP includes all of the RWSS resource consents, which are all valid and in place, along with a huge body of background work including drilling logs and a full EPC design for the project that contracted by HBRIC to a Spanish based consortium in 2016.

The TWSP is a Community based entity that reshaped the RWSS project and arranged the funding of and completion of the Lewis Tucker Rescoping Report, which I refer to in the main Fast Track application document, through the Tukituki Water Security Limited vehicle.

As explained in the Fast Track Application lodged with MfE:

- The Tukituki Water Security Project has agreement in principle from Water Holdings Hawke's Bay Limited to access and use the consents and IP from the RWSS project.
- An important part of the TWSP rescoping has been a programme of meetings through 2023 and the first part of 2024 to establish a Community Trust with the intention that the Trust will hold the current resource consents for the project and oversee the commercial development to ensure the

project is developed in a way that provides the maximum benefit to the Central HB and wider HB communities.

- TWSP and WHHB are currently in detailed discussions with Tamatea Pokai Whenua Trust and CHBDC regarding the establishment of the structure, function and purpose for the community entity with a target date of 30 July 2024 to have the entity established.

The parties are still on track to have this Community Trust established, and the RWSS resource consents and IP package transferred to the Community Trust by the target date of 30 July 2024.

I have copied the Chief Executives of the Tamatea Pokai Whenua Trust and Central Hawke's Bay District Council into the reply email attaching this memorandum, so all four relevant parties are in the loop on this further feedback.

THE 2017 CONSERVATION ACT SUPREME COURT DECISION

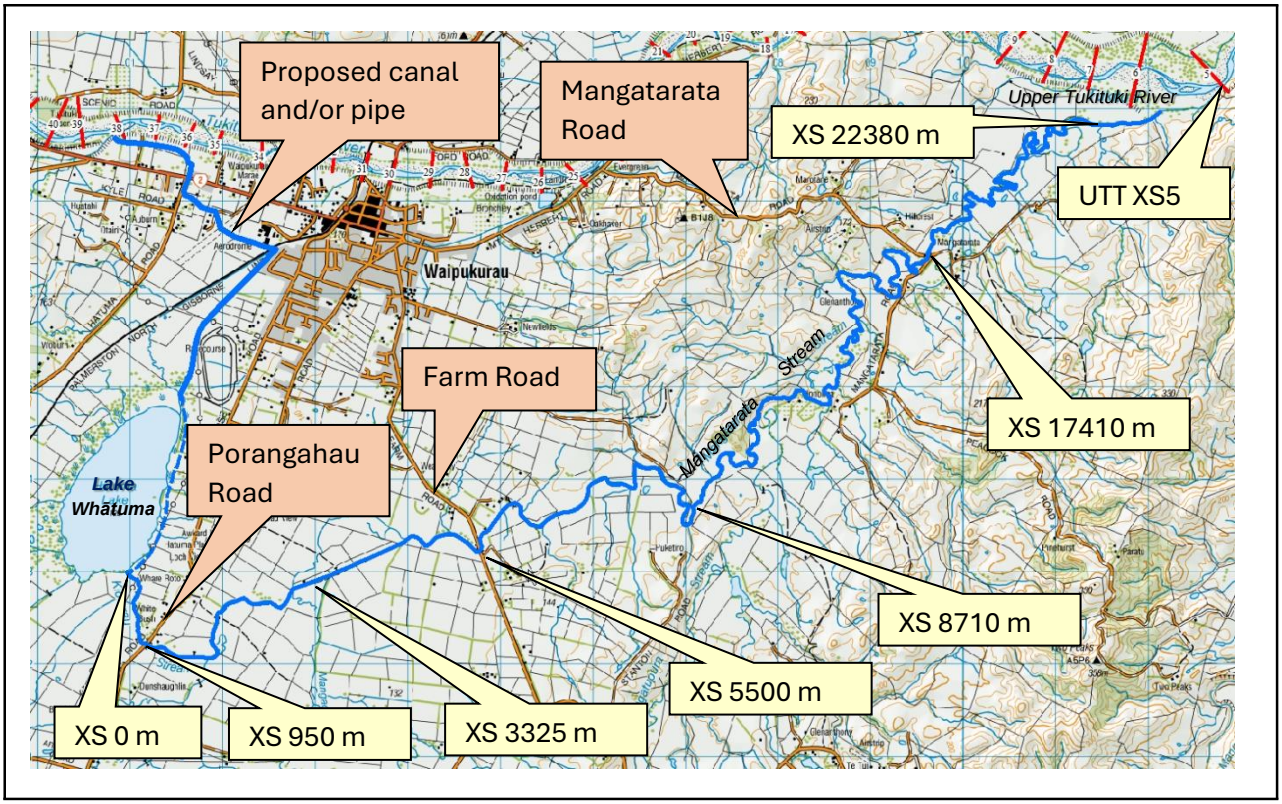
I have attached a legal memorandum prepared by experienced Barrister, James Winchester, that summarises and puts in context the scope and effect of this Supreme Court Decision. This is attached to this document as **Appendix E**.

A copy of the Supreme Court decision itself is provided in **Appendix F**.

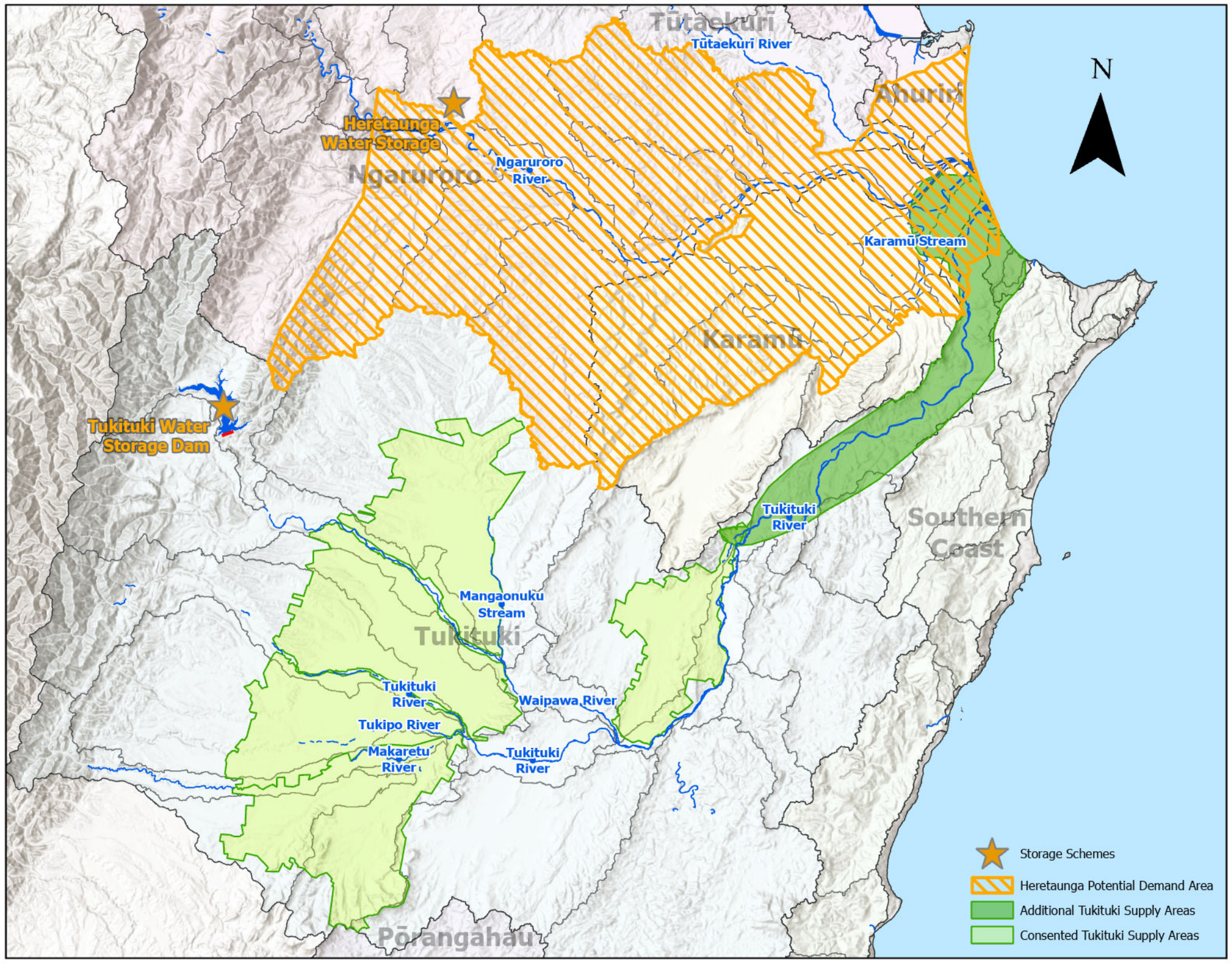
Please contact me again if you require any further clarification.

Stephen Daysh
Partner

Appendix A


Proposed canal and/or pipe
Mangatarata Road
XS 22380 m
Upper Tukituki River
UTT XS5
Waipukurau
Farm Road
Mangatarata Stream
XS 17410 m
Porangahau Road
Lake Whatuma
XS 8710 m
XS 5500 m
XS 0 m
XS 950 m
XS 3325 m

Appendix B


Tūtaekuri
Tūtaekuri River
N
Ahuriri
Heretaunga
Water Storage
Ngaruroro
Ngaruroro
River
Karamū Stream
Karamū
Tukituki Water
Storage Dam
Tukituki
River
Southern
Coast
Mangaonuku
Stream
Tukituki
Tukituki
River
Waipawa River
Tukipo River
Makaretu
River
Tukituki
River
Pōrangahau
Storage Schemes
Heretaunga Potential Demand Area
Additional Tukituki Supply Areas
Consented Tukituki Supply Areas

Appendix C

RUATANIWHA Water Storage

Ruataniwha Water Storage Scheme

Plan 2
Makaroro Dam and Reservoir

N

1:25,000

0 500 1,000 Meters

Legend

- Construction Areas (Outside Reservoir Footprint)
- Makaroro Dam & Associated Construction Area (See Plan 3)
- Affected Properties (Numbered)
- Indicative New Roads & Tracks
- Indicative Dam Crest
- Reservoir Footprint (Within which construction activities will occur)
- Planting Buffer (20 m width)

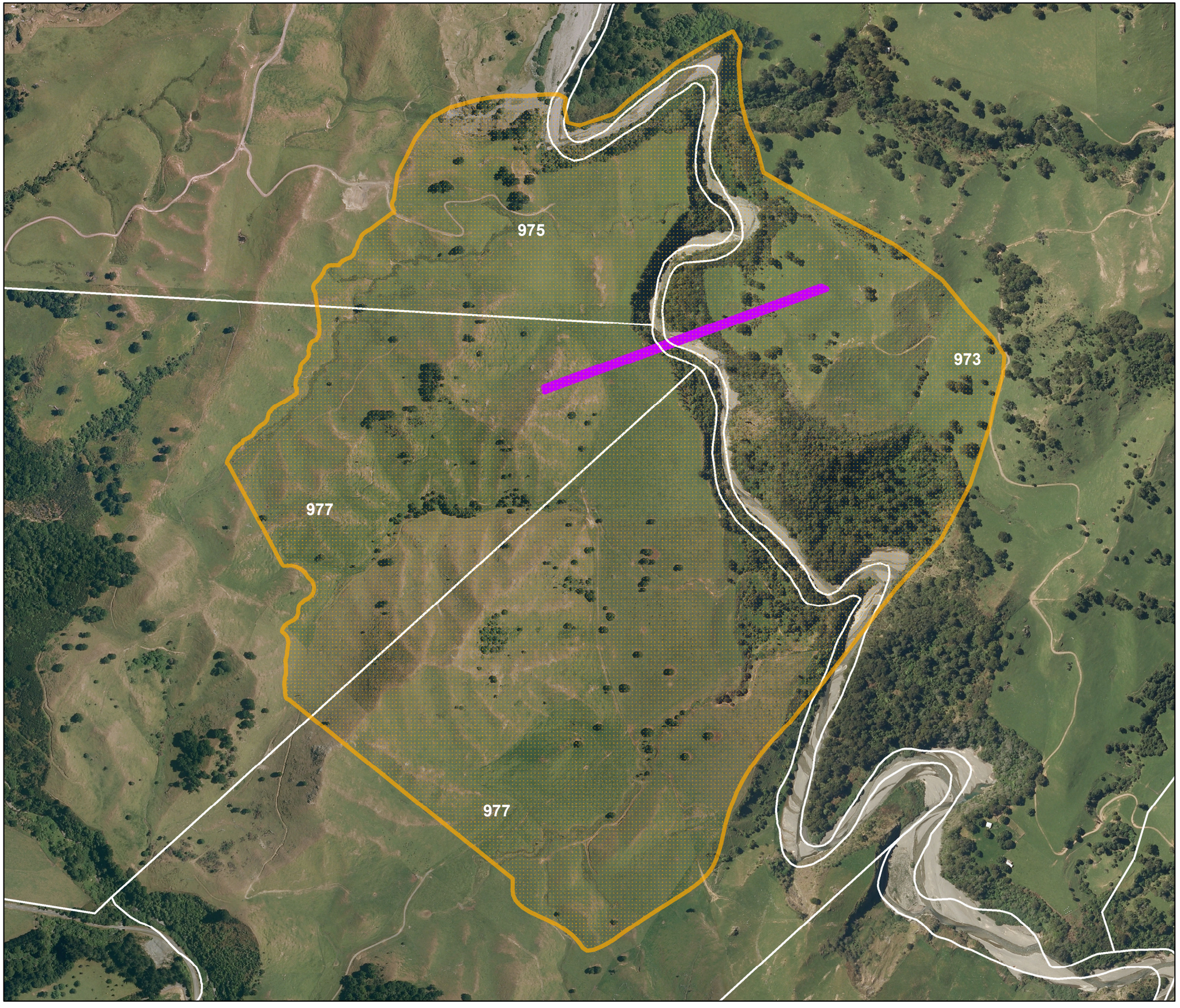
HAWKE'S BAY REGIONAL INVESTMENT COMPANY LTD

HAWKE'S BAY REGIONAL COUNCIL

DATA FROM: Farm information obtained from the Hawke's Bay Regional Council's Geographic Information Systems Database.

DISCLAIMER
The Hawke's Bay Regional Council cannot guarantee that the data shown on this map is 100% accurate.

Date: May 2013 Final



RUATANIWHA
Water Storage

Ruataniwha Water Storage Scheme

Plan 3
Makaroro Dam & Associated Construction Area

N

1:6,000

0 50 100 200 300 Meters

Legend

- Makaroro Dam & Associated Construction Area
- Affected Properties (Numbered)
- Indicative Dam Crest

HAWKE'S BAY REGIONAL INVESTMENT COMPANY LTD

HAWKE'S BAY REGIONAL COUNCIL

DATA FROM: Farm information obtained from the Hawke's Bay Regional Council's Geographic Information Systems Database.

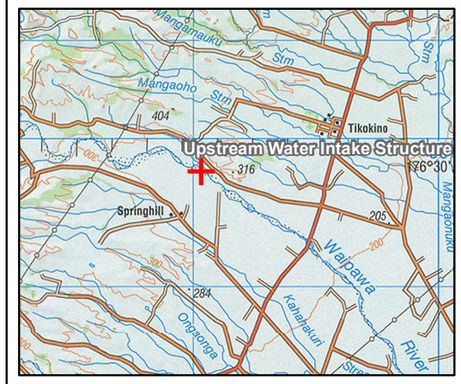
DISCLAIMER
The Hawke's Bay Regional Council cannot guarantee that the data shown on this map is 100% accurate.

Date: May 2013 Final

RUATANIWHA
Water Storage

Ruataniwha Water Storage Scheme

Plan 4
Upstream Water Intake Structure on the Waipawa River

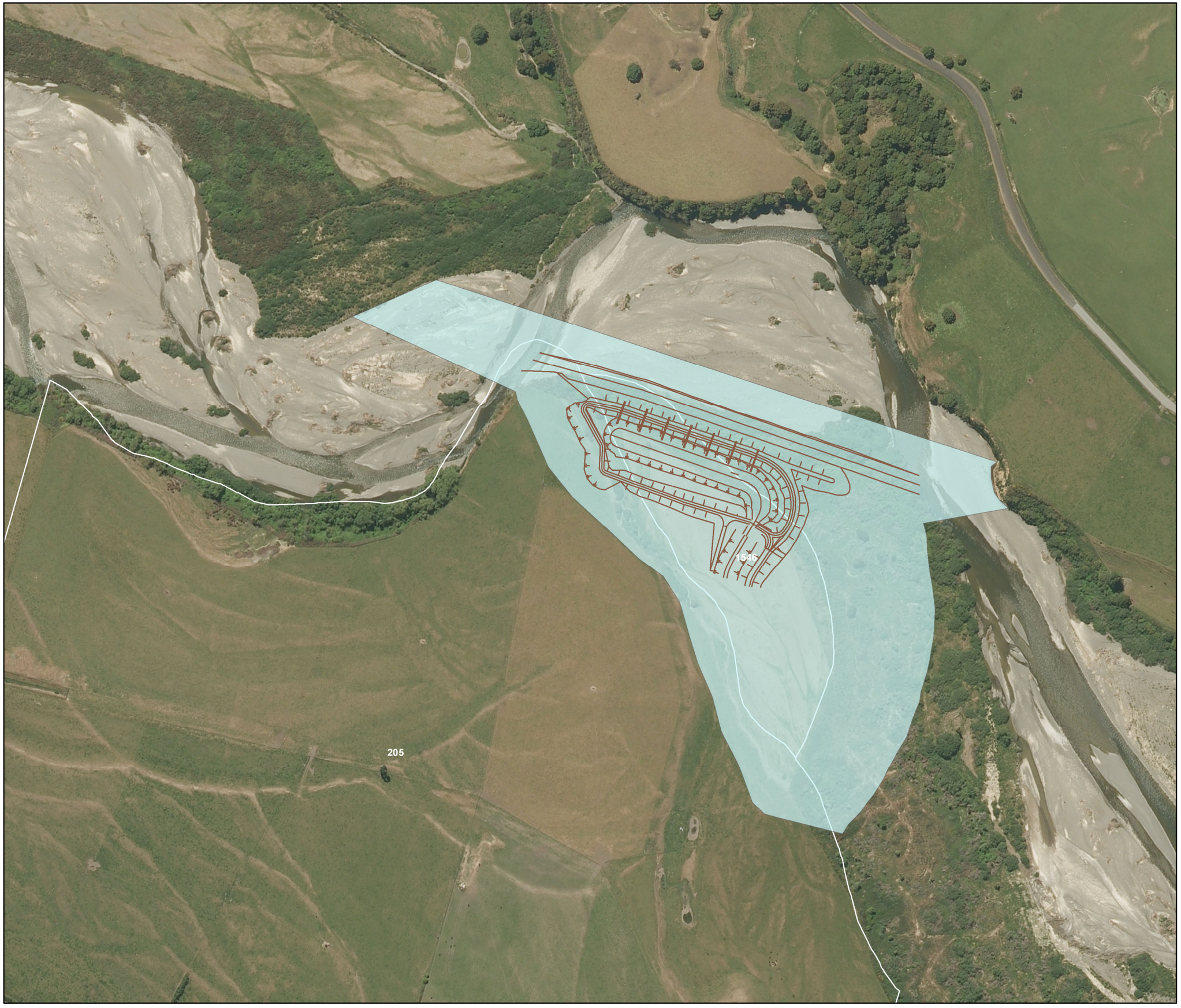


Locality Plan

N

1:3,000

0 12.525 50 75 100 Meters



Legend

- Water Intake Structure
- Water Intake Construction Area
- Affected Properties (Numbered)

HAWKE'S BAY REGIONAL INVESTMENT COMPANY LTD

HAWKE'S BAY REGIONAL COUNCIL

DATA FROM: Farm information obtained from the Hawke's Bay Regional Council's Geographic Information Systems Database.

DISCLAIMER
The Hawke's Bay Regional Council cannot guarantee that the data shown on this map is 100% accurate.

Date: May 2013 Final

Appendix D

Central Hawke's Bay Proposed District Plan Part 3 – Area-Specific Matters Designations

Ruataniwha Water Storage Scheme Distribution System	
Designation unique identifier	CHBDC-72
Designation purpose	Ruataniwha Water Storage Scheme - Primary distribution system (Zones A – D).
Site identifier	Various (Maps 10, 11, 15, & 21)
Lapse date	20 December 2026
Designation hierarchy under section 177 of the Resource Management Act	Primary
Conditions	Yes
Additional information	Rollover, no former designation ID.
Designation unique identifier	CHBDC-72
Designation purpose	Ruataniwha Water Storage Scheme - Primary distribution system (Zones A – D).

Appendix E

JAMES WINCHESTER
BARRISTER

8 April 2024

Mike Petersen
Chair
Tukituki Water Security Project

Former Ruataniwha Water Storage Scheme and Supreme Court decision on proposed land exchange

1. I set out the background and key issues regarding the statutory approvals for the Ruataniwha Water Storage Scheme (now known as the Tukituki Water Security Project (**TWSP**)), including the legal barriers identified by the Supreme Court in July 2017[1] respect of decision-making under the Conservation Act 1987 (**CA**). These matters are directly relevant to considering options for removal of those barriers in the Fast-track Approvals Bill (**Bill**).

2. Approval of the TWSP was required under two statutory processes:

   a. Resource Management Act 1991 (**RMA**): a suite of 17 resource consents (including for the proposed Makaroro Dam and reservoir), a designation for the construction and operation of the primary distribution network, and a change to the Hawke's Bay Regional Resource Management Plan which set minimum flows and water quality measures for the Tukituki catchment, were fully tested and finally approved on their environmental merits by an independent Board of Inquiry in 2015, following lengthy public consultation, submission and hearing processes. All of these RMA approvals remain in force and effect.
   b. CA: this process considered the proposed exchange of 146 hectares of privately owned native bush for 22 hectares of conservation land[2] within the proposed Makaroro reservoir footprint. It was this process that was the subject of legal challenge by way of judicial review, ultimately resulting in the Supreme Court decision.

Supreme Court decision

3. The decisions made by the Director-General of Conservation (**D-G**) under the CA to enable the exchange of private land for conservation land involved four steps:

   a. declaring the conservation land to be held for conservation purposes[3];
   b. revocation of conservation park status[4] in order to change its status to stewardship land;
   c. exchanging stewardship land resulting from revocation for private land[5]; and
   d. declaring private land to be held as conservation park under the CA[6].

4. Complex and inter-related legal arguments were made about the lawfulness of these steps, as well as the relevance of the D-G's consideration of the net environmental/conservation benefits

1 *Hawke's Bay Regional Investment Co Ltd v Royal Forest & Bird Protection Society of NZ Inc* [2017] NZSC 106
2 This was former forest park land which was held under the CA for 28 years subject to transitional deeming provisions as to its status
3 Section 7 of CA, relating to section 61(3) of the CA
4 Section 18(7) of CA
5 Section 16A of CA
6 Section 16A(3) of CA

of the proposed exchange. Issues as to whether it was lawful under the CA for the D-G to make such decisions for the explicit purpose of facilitating an element of the TWSP were also argued.

5. The D-G's decision had accepted a Departmental Science Report assessment that, comparatively, the conservation values present in the private land were better than those in the conservation land. It was concluded that an exchange would enhance the conservation values of land managed by DoC and promote the purposes of the CA. On judicial review, the merits of these decisions were not tested, but rather the lawfulness and reasonableness of the D-G's decisions by reference to the provisions of the CA.

6. The Supreme Court confirmed that the only available option for the first step, of declaring the former forest park land to be conservation land, was for it to become conservation park. For the second step, because it became a conservation park, in order to revoke that status, the majority[7] held it would have to be concluded that the intrinsic conservation values no longer warranted protection. The D-G's decision did not revoke that status because it was inappropriate, but rather because it was to enable the subsequent exchange and result in a net conservation benefit.

7. In essence, the decisions were overturned because the second step was held to be unavailable to the D-G due to the language of section 18(7) of the CA, meaning that the third and fourth steps were also unavailable. Other errors were identified, but they largely related to failures to have regard to relevant considerations[8]. Other legal uncertainties were also identified, but not determined[9].

8. Accordingly, the Supreme Court decision was made on a strict interpretation of the language of relevant provisions of the CA. It did not consider the merits of the land exchange in terms of whether it would enhance conservation values within the conservation estate. It was not clear from the scheme of the CA that the outcome was intentional.

Issues with the Bill

9. A detailed analysis of the Bill has been undertaken and this is set out in Appendix 1 to this advice. In short, there is a risk that the identified issues will mean that the Bill will not enable TWSP's intended outcomes to be achieved, with particular regard to CA issues. This should be the subject of a Select Committee submission by TWSP on the Bill.

Yours sincerely

James Winchester

7 The split in the Supreme Court was 3:2
8 Failing to take into account statutory planning documents under the CA
9 For example, the possible need for decisions regarding marginal strips likely to be impacted by a land exchange

APPENDIX 1 – ISSUES ARISING IN THE BILL

1. On its face, the Bill covers approval processes in the CA[10], and enables approvals to be given under the proposed new Act rather than the legislation that establishes or provides for those approvals[11]. It also states in clause 10(5) that:

> An approval under this Act has full effect on its terms for all purposes, and any specific approval referred to in subsection (1) that is included in the approval under this Act must be treated as if it were granted, issued, or entered into in accordance with the legislation that establishes or provides for it.

2. Clause 10(3) and (5) could however be read as saying that the new Act is a different means to enable grant of the same approvals as in the underlying Acts. It needs to be made clear that the processes set out in the Schedules to the Bill govern both the approvals that may be granted, and how they may be granted, notwithstanding anything in the underlying Acts.

3. As a preliminary point, under the land exchange provisions of the CA, one of the important steps is making *declarations* as to the status of the land. This decision-making power is not explicitly identified as an "approval" as defined in clause 4 of the Bill but, for the sake of certainty, should be.

4. Whether a project is listed or referred, it goes to an expert panel for assessment. The panel produces a report and recommendations to the joint Ministers for a decision[12]. The panel is obliged to follow process provisions in relation to its assessment of a project[13], which includes Schedule 5 dealing with CA approvals.

5. Part 3 of Schedule 5 expressly provides for the Minister of Conservation to authorise land exchanges of conservation areas[14] for land specified by an applicant. There is an immediate problem in that Schedule 5 is only referred to in the Bill as a process provision for panels, when in fact it appears to be a substantive decision-making provision for the Minister of Conservation.

6. In addition, the scope of the role of panels is unclear due to inconsistent use of language, particularly whether non-RMA approvals go to a panel for consideration. Clause 11 of the Bill states that the role of panels is to consider projects, rather than approvals. The provisions of the Bill which deal with panels suggest something different however, in that the function of a panel is to consider each *project*[15] but also to assess and make recommendations on proposed *approvals*[16].

7. Both the use of language and linkages and between Schedules 3 and 5 and clauses 10, 11 and 30 of the Bill therefore need to be made clear and be reconciled in order for these important provisions to be effective. At the least, clause 11 of the Bill should be amended to refer to approvals under the Acts listed for a project to proceed.

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10 Clause 10(1)(c) of the Bill
11 Clause 10(3)
12 Clause 25 of the Bill
13 Clause 30(1) of the Bill
14 Which would include the relevant land to be occupied by the Makaroro dam and reservoir
15 Clause 1(1), Schedule 3 of the Bill
16 Clauses 1(2) and (3), Schedule 3

8. Clause 18 of Schedule 5 is the substantive provision enabling land exchanges. Problems identified in the Supreme Court decision appear to be covered by this clause, including the need to consider statements of general policy (but not regional conservation management strategies)[17], and the need for a report assessing the conservation values of the lands concerned and their comparative values (without the need for that report to identify a net conservation benefit)[18].

9. Usefully, Schedule 5 appears to be intended as a self-contained code for land exchange under the Bill, and prevails in the event of inconsistency between it and the CA[19]. This intention could however be clarified and strengthened given the observations above about Schedule 5 being incorrectly described as a process provision. This intention should be made clear in the body of the Bill rather than a Schedule. In addition, if a declaration has been made under the CA about the status of land, this does not prevent land exchange nor require a revocation of status under section 18(7) of the CA to give effect to the land exchange[20]. This would appear to address steps 1 and 2 considered in the Supreme Court decision.

10. Finally, certain sections of the CA are disapplied[21] for a land exchange under clause 18, including those requiring reservation and exchange of marginal strips, ownership of riverbeds by the Crown, and a transitional deeming provision as to the status of stewardship land. These matters likely address the residual legal uncertainties identified but not determined by the Supreme Court.

17 Clause 18(2), Schedule 5
18 Clauses 18(2) and (3), Schedule 5
19 Clause 18(8), Schedule 5
20 Clause 18(9), Schedule 5, noting that clause 18(10) identifies that it means declarations under section 61 or 62 of the CA deemed to be held for specific purposes.
21 Clause 19 disapplies sections 24, 24E(2) to (4), 24F and 62 of the CA.

Appendix F

IN THE SUPREME COURT OF NEW ZEALAND

SC 106/2016
[2017] NZSC 106

BETWEEN	HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED Appellant
AND	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	MINISTER OF CONSERVATION Second Respondent

SC 107/2016

BETWEEN	MINISTER OF CONSERVATION Appellant
AND	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED Second Respondent

Hearing:	27 and 28 February 2017
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	F M R Cooke QC and M J E Williams for Appellant SC 106/2016 and Second Respondent SC 107/2016 D M Salmon, S R Gepp and P D Anderson for First Respondent SC 106/2016 and SC 107/2016 A L Martin, J M Prebble and J E Dick for Second Respondent SC 106/2016 and Appellant SC 107/2016
Judgment:	6 July 2017

JUDGMENT OF THE COURT

A The appeals are dismissed.

B Costs are reserved. If an order for costs is sought, the parties may file written submissions within one month of the date of judgment.

REASONS

ELIAS CJ, GLAZEBROOK AND ARNOLD JJ
(Given by Elias CJ)

Table of Contents

Introduction

[1] The Ruahine Forest Park in Hawke's Bay is former State forest park which is deemed under the Conservation Act 1987 to be held by the Minister of Conservation for conservation purposes as conservation park, a category of specially protected land under the Act. Land held by the Minister for conservation purposes which does not have additional special protection is stewardship land and may be disposed of by the Minister or exchanged for other land under the provisions of the Act. Land with additional protection, such as land with the status of conservation park, may not however be exchanged or otherwise disposed of by the Minister while the protected status continues.

[2] The Royal Forest and Bird Protection Society of New Zealand Incorporated challenged a decision of the Director-General of Conservation, acting under the delegated authority of the Minister, to revoke the special protection of conservation park status for 22 hectares of the Ruahine Forest Park. The revocation decision was made by the Director-General so that the 22 hectares could be exchanged for other land to be provided by the Hawke's Bay Regional Investment Company Limited.[1] The Company plans to build a dam on the Makaroro River for water storage purposes which will inundate the 22 hectares. The decision of the Director-General to revoke the special protection of the land was upheld in the High Court[2] but was set aside by majority decision in the Court of Appeal.[3] The Minister and the Company appeal to this Court.

[3] The Director-General's revocation decision was based on the relative conservation values of the 22 hectares of forest park and the conservation values obtained in the land for which it is to be exchanged. The Society has argued that this relative assessment between the two blocks of land to be exchanged is inconsistent with the scheme of the Act. The Act is said to have required focus on the intrinsic conservation values of the 22 hectares in determining whether its protected status

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1 Often referred to in documents as "HBRIC".

2 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 (Palmer J).

3 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 (Harrison and Winkelmann JJ; Ellen France P dissenting).

was appropriate rather than measuring the net gain to the conservation estate in the exchange.

[4] There are two linked principal issues on the appeal: whether the scheme of the Act permits a statutory power to revoke additional protection for conservation land to be exercised for the purpose of allowing it to be exchanged as stewardship land; and whether revocation decisions can be taken on the basis on which exchanges of stewardship land may be made (being that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act). Subsidiary issues are whether the decisions to revoke the additional protected status of the land so that it can be exchanged for private land must be in accordance with the Conservation General Policy and the Hawke's Bay Conservation Management Strategy (statutory planning instruments adopted under the legislation) and whether the exchange triggers the creation of marginal strips along rivers and streams in the former forest park land which is exchanged.

Background

[5] Twenty-two hectares of the Ruahine Forest Park will be inundated in a reservoir for water storage purposes to be created behind the proposed Ruataniwha Dam across the Makaroro River, for which the Company has obtained statutory resource consents. The land is in two separate riparian blocks. One of eight hectares extends along the left bank of the Makaroro River. The second block of 14 hectares runs along Dutch Creek, a tributary of the Makaroro River. It is accepted by the Department that the 22 hectares contain areas of "high value". Some are ecologically significant.[4]

[6] The Company approached the Minister of Conservation for a concession in the form of an easement to facilitate the use of the land in the water storage scheme.[5] Advice provided to the Department concerning ecological values and effects of the proposed easement described the entire 22 hectares as "threatened", and areas within it as "acutely threatened" or "chronically threatened". Of concern in terms of the

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4 The conservation values of the land, as identified in the scientific reports provided to the Director-General, are more fully described below at [15]–[19]. See also at [27]–[28].

5 Pursuant to the provisions in Part 3B of the Conservation Act 1987.

national priorities for biodiversity protection[6] were the oxbow wetland on the true right of Dutch Creek, and a small portion of land on the true left of the Makaroro River adjacent to and including braided river gravels, a nationally rare ecosystem. The land also contains habitat for a nationally vulnerable species (the North Island long-tailed bat) and declining species (North Island fernbird and red mistletoe). The ecological advice concluded that "[t]here is no doubt, therefore, that the areas of indigenous habitat which are subject to the proposal contain significant ecological values within a national context".

[7] It was accepted by the report writer of a Departmental draft report on the proposed easement that the flooding of the land would result in the loss of all ecological values present. The draft report also identified that there were likely to be secondary effects to the remaining forest because of the raising of the water table and that the recreational use of the land would be affected. It noted that some of the land "appears to be nationally significant" and that "the values of the Land are such that the application [for a concession] is inconsistent with the terms of the Conservation Act 1987".

[8] Following this draft report, the concession application appears to have been parked. Instead, the Department and the Company looked to a solution by which the land would be taken out of the forest park altogether. The Company eventually proposed to the Minister of Conservation that the 22 hectares of forest park be exchanged for a privately owned block of 147 hectares, the Smedley land, adjacent to the Ruahine Forest Park and currently being grazed.[7] Under the exchange the 22 hectares proposed to be inundated as part of the Ruataniwha Water Storage Scheme would be transferred into the ownership of the Company and no longer held by the Department for conservation purposes. Subject to questions as to whether a marginal strip would be reserved to the Crown in the exchange (discussed below

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6 The *Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land* (Ministry for the Environment, ME 805, April 2007) is a document issued by the Minister of Conservation and Minister for the Environment in 2007, the aim of which is to provide a system for the identification and classification of the most vulnerable ecosystems and habitat on private land.

7 As noted below at [29], n 11, the original proposal was for 147 hectares but the Director-General's approval of the revocation and proposed exchange was ultimately subject to the Company adding 23.4 hectares to the Smedley land so that the Department would receive 170 hectares of land in total.

at [150]–[161]), it seems that the use of the land for water storage would not then require a concession under the Conservation Act.

[9] The Company has entered into a conditional agreement to purchase the Smedley land in order to effect the proposed exchange. The exchange can be effected under s 16A of the Act only if the protected conservation park status of the land is first revoked under s 18(7) so that the status of the land changes to conservation land held by the Minister as stewardship land, rather than land with the additional protected status of conservation park.

[10] Because the land is forest park land subject to transitional provisions of the Act (as is explained below at [45]–[47]), the sequence needed to effect the exchange required:

(a) first, that the land be declared to be held for conservation purposes under s 7(1) or (1A) (bringing its transitional status to an end);

(b) secondly, that the conservation park status (which continued to apply under s 61(3) on a declaration that the land be held for conservation purposes) be itself lifted by revocation of conservation park status under the power conferred on the Minister in s 18(7) of the Act;

(c) thirdly, that the Minister exercise the power under s 16A to exchange the stewardship land (resulting from revocation of conservation park status) for the Smedley land; and

(d) finally, declaration under s 16A(3) that the Smedley land obtained be held as conservation park.

[11] The Department considered whether to bring the transitional status of the land to an end by proceeding under s 7(1A) of the Act, which it considered (erroneously, as we think[8]) was a stand-alone alternative to s 7(1) and one that did not require public notification. Because the area in question was accepted to have

[8] See below at [87]–[93].

high conservation values and there was a high level of public interest in changing the protected status of the conservation park, it decided to use the s 7(1) procedure for the revocation of conservation park status, requiring public notice.

[12] The powers of the Minister under s 7(1) (to declare land to be held for conservation purposes) and 7(1A) (to declare former State forest land to be held for conservation purposes) and under s 16A (to exchange stewardship land) are the subject of general delegations made under the Act. The power to revoke conservation park status under s 18(7) was not the subject of general delegation. Instead the Minister on 1 December 2014 delegated to the Director-General of Conservation, with power to sub-delegate, the power under s 18(7) to:

- form the intention to revoke conservation park status; and
- make the revocation decision.

The Minister subsequently revoked the power to sub-delegate, and required the power to revoke the conservation park status to be exercised by the Director-General.[9]

[13] The delegation under which the revocation decision was taken is therefore one entered into in February 2015 by the Minister. It authorised the Director-General of Conservation to "revoke conservation park status by Gazette notice", which was defined to apply:

> … in the circumstances of part of the Ruahine Conservation Park being required for a land exchange associated with the Ruataniwha Water Storage Scheme.

As appears from the terms of the delegation, the delegated power to revoke the conservation park status of the land under s 18(7) was specifically limited to the

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[9] Though the initial view that a land exchange should be progressed had already been formed by the Deputy Director-General: *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [37], n 19.

purpose of the land exchange associated with the Ruataniwha Water Storage Scheme.[10]

[14] The proposal to revoke protection for the 22 hectares of forest park in order to exchange it for the Smedley land was publicly notified and attracted a number of objections, including from the Society. The application and objections were considered by a hearing panel which also received additional scientific assessments from the Department relating to the relative conservation values of the two blocks of land (principally by reference to ecological and landscape values).

[15] The material considered by the convenor of the hearing panel, Mr Kemper, included scientific reports of the values to be found in the two blocks of land, including a peer review of one of the reports. All scientific reports focused on the benefits in the exchange. One report writer reached the conclusion that the habitat and species values in the 22 hectares of forest park were "marginally better" than the values in the Smedley land and that not all habitats in the 22 hectares were duplicated in the Smedley land. Riverbed would be lost. He noted that on the other hand "similar forest habitat in the Smedley Block is 5.5 times the size of the area that will be inundated in Ruahine Forest Park, and there will be similar habitats to that which will be lost, to be found elsewhere in Ruahine Forest Park". It was also thought to be of advantage that the Smedley land was contiguous with conservation areas, whereas eight hectares of the forest park land was an "outlier separated from the main block by a pine plantation". "Overall management" would therefore be improved by the exchange. It was on this basis that the writer concluded that "the proposed exchange does reflect an enhancement of conservation values from an ecological point of view". This report was not accepted in full by the hearing convenor who questioned whether it was "sufficiently comprehensive". The convenor sought a further report as to the values in the relevant parcels of land and how they compared.

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[10] It was not argued that facilitation of the Ruataniwha Water Storage Scheme was itself an improper purpose in exercising powers under the Conservation Act in application of the principles discussed in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA). Nor was it contended that the restriction in the delegation of the revocation decision to facilitation of the Ruataniwha Water Storage Scheme wrongly fettered the statutory power of revocation. We express no views on these possible additional arguments.

[16] The further report obtained and relied on by the hearing convenor compared the relative values of each block. The summary indicates that they were compared for factors such as the existence of "emergent podocarps", size, underlying geology and "altitudinal range", complementarity with adjoining conservation areas, assessment of degradation and potential for regeneration (for example once grazing on the Smedley land was stopped), distinctiveness of the wetlands on each block, and habitat for birds, fish, bats, geckos and skinks, and red mistletoe.

[17] In a number of respects the further report indicates that the 22 hectares of forest park land represented ecological or habitat features which were more acutely threatened than comparable features on the Smedley land. That was the case in particular in relation to habitat for fish species and fernbird. While it was acknowledged that there would be possible loss of habitat for seven migratory fish species, the report concluded that the loss of these populations was "not expected to result in a significant increase to their threat of extinction from elsewhere in the catchment". The Smedley land was however larger and had different underlying geology and altitude range supporting ecosystems "not present in [the] Ruahine Forest Park revocation land". The oxbow wetland on the 22 hectares of revocation land was significant in terms of national priorities, as were some wetlands on the Smedley land, although they were not considered "distinctive", as the oxbow wetland was. Potential habitat was considered to be comparable in the two blocks of land. Although red mistletoe was found only in the Dutch Creek parcel, not in the Smedley land, the report indicated that red mistletoe was represented in the Ruahine Forest Park in other locations and that "it is feasible to translocate mistletoe through careful placement of seed on host trees" and therefore the presence of red mistletoe on the 22 hectares was "not considered significant".

[18] The report concluded that "from an ecological and biological point of view … the proposed exchange offers an enhancement to conservation values" (particularly because the Smedley land is "underpinned by a different geology") and that the Smedley land was a "worthy addition" to the Ruahine Forest Park. It is clear, however, that the scientific assessment was relatively even and there is no suggestion that the values identified on the 22 hectares were not significant and did

not in themselves warrant continued protection in the absence of the exchange. The assessment was that, on balance, there were net gains in the exchange.

[19] The hearing convenor invited comment on the report. Because of objections, particularly as to the report's treatment of freshwater values and the relevance of future effects, the Department's science team carried out a further assessment, separately addressing terrestrial, wetlands and streams components, as well as an overall assessment "both with the dam and without it". The hearing convenor noted that while "a number of the comments made by the objectors have raised valid issues", the science team "[did] not consider that the issues raised by objectors and the clarifications to the assessments and descriptions of values made in response change[d] the overall … conclusions in the Science Report (i.e. that the exchange would enhance the values of land managed by the Department and would promote the purposes of the Act)".

[20] The hearing convenor reported to the Director-General in September 2015 the views that the proposed exchange of land would enhance the conservation values of land managed by the Department and promote the purposes of the Act (the criteria on which exchange of stewardship land is permitted under s 16A of the Act). He was of the opinion that revocation of conservation park status could occur either if the values of the land were "not worthy of Conservation Park status" or ("also") if the revocation facilitated an exchange "that will benefit the land administered by the Department, and where the tests for an exchange (i.e. enhances the conservation values of land managed by [the Department] and promotes the purposes of the Act) are met". The hearing convenor agreed with the view expressed by the Department that "[t]he land being offered by exchange has been assessed as containing higher conservation values than the [conservation park] land, so the Minister has been able to form an intention to exchange". He accepted too that the resources in the conservation park land did not need to be retained for conservation park purposes "if the Minister's delegate agrees to proceed with the exchange":

> In revoking the land status to enable a land exchange better conservation values are obtained, which can be added to the Ruahine Forest Park.

The hearing convenor's report recommended that, if the Director-General decided to progress the exchange of land, he should revoke the conservation park status of the conservation land after first declaring the land to be held for conservation purposes under s 7(1) of the Act.

[21] In addition to the recommendations of the hearing convenor, the Director-General was also supplied with a Departmental report recommending that he make the series of decisions and as to their sequence. They were that the Director-General:

(a) declare the land to be held for conservation purposes under s 7(1) of the Act (with the effect under s 61(3) that it would be deemed to be held for the purposes of a conservation park);

(b) agree to revoke the status of the land as conservation park on the basis that he wished "to progress the proposed exchange of the [Ruahine Forest Park] land for the Smedley land";

(c) authorise the proposed land exchange under s 16A on the basis that the exchange met the statutory test under s 16A and that it was desirable that the Smedley land be acquired by exchange; and

(d) declare that the exchanged Smedley land be held as conservation park.

[22] The summary taken into account by the Director-General was that "from an ecological and biological point of view", exchanging the 147 hectare Smedley land for the 22 hectare Ruahine Forest Park revocation land would enhance the conservation values of land managed by the Department. This was the basis on which the Director-General agreed to the exchange and revocation of the additional protected status of the 22 hectares. He was advised in the following terms:

> In conclusion you need to be satisfied that the test for an exchange of land has been made out under s 16A of the Act. The information provided by HBRIC together with the Science report prepared by the Department reach the view that the Smedley land will enhance the conservation values of land

> managed by the Department and promote the purposes of the Act. If you approve the revocation of the purpose of the [Ruahine Forest Park] land on the basis that you are satisfied that the Smedley land meets the test in s 16A you should, subject to gazettal of your revocation decision under s 18(7) of the Act, proceed [formally] to authorise the exchange and give effect to that authorisation by Gazette Notice.

[23] Elsewhere in the report the advice was given that "[p]rovided you are satisfied that the purpose of the [Ruahine Forest Park] land should be revoked to enable the exchange to be progressed, you may agree to revoke the purpose of the [Ruahine Forest Park] land subject to gazettal of the declaration under s 7(1)". The application of conservation park status to the Smedley land was also recommended:

> In the case of the Smedley land there is sufficient information before you to enable you to conclude that it would be appropriate to classify the land for the purpose of a conservation park and to add it to the Ruahine Forest Park.

[24] The decision of the Director-General was communicated to the Company by letter of 5 October 2015. The letter records that, although the letter set out the decision, it had to be "read alongside two reports", both of which were part of the "overall decision". The two reports were the hearing convenor's report of 22 September 2015 and the Department's further report to the Director-General of 25 September 2015. The decision was subject to the conditions that the Company take title to the Smedley land and that an additional 23.4 hectares be added to the 147 hectares of the Smedley land originally proposed (making up the 170 hectares ultimately the subject of the exchange).

[25] As the terms of the delegation to the Director-General had indicated and as has been acknowledged throughout the litigation, the revocation of the conservation park status of the land and the exchange of land was for the purpose of the proposed Ruataniwha Water Storage Scheme. The decision is described as being one made "on the proposal by Hawkes Bay Regional Investment Company Limited (HBRIC) to exchange approximately 146 hectares (ha) of private land located within Smedley Station for two parcels of Ruahine Forest Park (RFP) land totalling approximately 22 hectares." The exchange is described in the decision letter as being:

> … for the purposes of the proposed Ruataniwha Water Storage Scheme which involves the placement of a dam over the Makaroro River and the inundation of land behind the dam which includes the [Ruahine Forest Park]

> land. As the land is currently held by the Public Trust, the exchange has been proposed subject to HBRIC taking title to the 146 ha of private land.

[26] The Director-General's decision to authorise the exchange was explained by him to have required "a number of other decisions":

> As the [Ruahine Forest Park] land is currently held as deemed conservation park, progressing the proposed exchange has required me to make a series of decisions. These decisions are to:
>
> (a) Declare the [Ruahine Forest Park] land to be held for "conservation purposes" under Section 7(1) of the Conservation Act 1987 (the Act);
>
> (b) Revoke the status of the [Ruahine Forest Park] land under Section 18(7) of the Act; and
>
> (c) Authorise the proposed land exchange under Section 16A of the Act.

[27] The Director-General recognised that the forest park land contained "some significant conservation values":

> The Makaroro river parcel, for instance, is located on an alluvial plain that is rare in the landscape and there is an acutely threatened land environment of 3.3ha.

On the other hand, he pointed out that the land had been heavily logged in the past and, although it has black beech and broadleaf forests, "they are not substantial". The land environment that was acutely threatened was said to have been "reasonably well represented on 92 ha of public conservation land elsewhere in the district". The Dutch Creek parcel was acknowledged to comprise black beech forest and secondary scrub, but the area of black beech had "lost emergent podocarps to logging". It did however have "a small but significant oxbow wetland".

[28] The Smedley land intended for the exchange was described as containing "2 significant wetlands and an underlying geology that differs from the rest of the Ruahine ranges":

> [I]t also supports ecosystems not present on the [Ruahine Forest Park] land. While it, too, has been logged, it has retained scattered emergent podocarps through a black beech forest that is almost 3 times more extensive than that on the [Ruahine Forest Park] land. Even though it is interspersed with 24 ha of pasture I am confident that the proposal to remove that land from grazing will, over time, lead to regeneration.

The Director-General also accepted and referred to the conclusion of the Department's science team that "whether the exchange proposal is assessed under a 'with dam' (i.e. future state) or 'without dam' (i.e. current state) scenario, the Smedley land will enhance the conservation values of land managed by the Department and promote the purposes of the Act". He took the view that "the values of the Smedley land warrant special protection" and that "it should be held as conservation park" and, desirably, included in the Ruahine Forest Park.

[29] The Director-General concluded:

> In summary I am of the view that the proposed exchange will well and truly meet the Act's test for exchanges. Moreover I consider that the conditions I am imposing[11] together with HBRIC's offers to undertake conservation work will further promote the purposes of the Act.
>
> As a result, and acting under delegation from the Minister of Conservation, I have decided:
>
> (a) To declare the [Ruahine Forest Park] land to be held for conservation purposes, as this is necessary to enable me to progress the proposed exchange;
>
> (b) To agree, subject to a Gazette notice giving effect to that declaration, to revoke the purpose of the [Ruahine Forest Park] land as a conservation park on the basis that I wish to progress the proposed exchange of the [Ruahine Forest Park] land for the Smedley land;
>
> (c) Subject to a Gazette notice giving effect to my decision to revoke the conservation park status of the [Ruahine Forest Park] land:
>
> (i) To authorise the proposed land exchange under s 16A(1) of the Act on the basis that I am satisfied on the information before me that the proposed exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act as required by s 16A(2);
>
> (ii) To agree, in accordance with s 16A(3) to hold the Smedley land for the purpose of a conservation park and include it in the Ruahine Forest Park; and
>
> (iii) To give notice of these last two decisions in consequential order by notice in the Gazette after gazettal of the earlier decisions set out above.

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11 The conditions imposed related to the Company taking title to the Smedley land and adding to it an additional 23.4 hectares (which were to incorporate Donovan Gully); undertaking boundary fencing and bearing the costs of survey; and carrying out additional conservation work for whio habitat restoration (including predator control) and wilding pine eradication.

[30] The Director-General also described the process that led to his decisions in his affidavit evidence in the High Court. In consenting to the revocation of protected status, he said he adopted the Department's submissions and took into account the application proposing the exchange from the Company, the scientific evidence (described above), the submissions received together with relevant correspondence, and the hearing convenor's report. He adopted the hearing convenor's views as to the power to revoke conservation status and in rejecting the objections based on the Conservation General Policy and Hawke's Bay Conservation Management Strategy. The Director-General accepted also that it was premature to consider the question of reservation of marginal strips.

[31] With respect to the "scientific information and land values", the Director-General confirmed in his affidavit evidence that he had assessed the scientific information "on a before and after the dam scenario". He took the view that the scientific information covering both the forest park land and the Smedley land was "thorough, reliable and objective and the peer reviews of it assisted in this". As a result he was left in "no doubt" that what was proposed would "enhance the conservation values of land managed by the Department and promote the purposes of the Act". This conclusion was also said to be supported by the fact that, while the Makaroro and Dutch Creek parcels of the existing forest park were not currently used for outdoor recreation, acquisition of the Smedley land would provide access not only to that block but further access to the Gwavas Conservation Area.

The Society's application for judicial review

[32] The Society sought judicial review in the High Court of the decision of the Director-General revoking the conservation park status of the 22 hectares. In its first three overlapping causes of action the Society sought orders setting aside the decisions to revoke the protected status of the 22 hectares and the consequential decision to exchange the land on the basis that the revocation decision was:

(a) inconsistent with the statutory scheme (and in particular its distinction between protected land and stewardship land);

(b) exercised for an improper purpose, "being to facilitate a proposed land exchange" when the Act prevented exchange except of stewardship land;

(c) made after taking into account the irrelevant considerations of a proposed land exchange and "net benefit" to the conservation estate.

[33] In a further cause of action the Society claimed that the Director-General had acted unlawfully in the revocation decision in failing to act in accordance with or take into account relevant provisions of the Hawke's Bay Conservation Management Strategy and the Conservation General Policy, statutory planning instruments it said the Minister and her delegate were obliged to observe or take into account under the Act. An additional cause of action was that the Director-General had erred in law in failing to address the marginal strips that would be created by disposal of the land by way of land exchange in respect of rivers and streams on the 22 hectares with average widths of three metres or more. Since the marginal strips created through the disposition by exchange would be inundated by the reservoir proposed, the Society claimed that a concession was required under the Act or, alternatively, exchange of the marginal strips themselves. It was claimed that the Director-General's decision was unlawful because it did not address the statutory requirements for marginal strip concessions or exchanges.

[34] The Minister denied the allegations made as to unlawfulness in the decisions taken and said that the requirements under s 16A for exchange of land were properly made out and the purpose of exchange was properly relevant to the revocation decision. She said that an exchange under s 16A is not a disposition of land triggering the reservation of marginal strips and that, in any event, any consideration of reservation of marginal strips is premature because it is dependent on survey yet to be carried out for the exchanged land and completion of the exchange.

[35] These matters of pleading continued to frame the arguments in the judicial review and on appeal to the Court of Appeal and to this Court. Before considering them and describing the course of the litigation, it is however necessary to set out the scheme of the legislation.

Scheme of the legislation

(a) Purpose

[36] The Conservation Act is "[a]n Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation".[12] Land held under the Act is held "for conservation purposes", as "conservation area".[13] "Conservation" is defined to mean the "preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations".[14] "Preservation" is defined, in relation to a resource, as "the maintenance, so far as is practicable, of its intrinsic values". And "protection", in relation to a resource, means "its maintenance, so far as is practicable, in its current state; but includes … its restoration, … augmentation, enhancement, or expansion".

[37] Section 7 empowers the Minister to declare that land is held for "conservation purposes":

> **7 Land may be acquired and held for conservation purposes**
>
> (1) The Minister, and the Minister responsible for an agency or department of State that has control of any land, may jointly, by notice in the *Gazette* describing it, declare that the land is held for conservation purposes; and, subject to this Act, it shall thereafter be so held.
>
> (1A) Notwithstanding subsection (1), in the case of any land to which section 61 or section 62 applies, the Minister may, by notice in the *Gazette* describing it, declare that the land is held for conservation purposes; and, subject to this Act, it shall thereafter be so held.
>
> (1B) In the case of land that is foreshore within the common marine and coastal area, the Minister may declare, by notice in the *Gazette* describing the land, that the land is held for conservation purposes.
>
> (2) The Minister may, by agreement, acquire any interest in land for conservation purposes; and, subject to this Act, it shall thereafter be held for those purposes.

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12 Conservation Act, long title.
13 Section 2(1), definition of "conservation area" and s 7.
14 Section 2(1).

(3) Nothing in subsections (1) and (2) applies in respect of land that is Crown forest land within the meaning of section 2 of the Crown Forest Assets Act 1989.

(4) For the purposes of subsection (1), the Minister of Forestry shall be deemed to be the Minister responsible for a department of State that has control of State forest land that is not Crown forest land within the meaning of section 2 of the Crown Forest Assets Act 1989.

(b) Protected land and stewardship land

[38] Land held for conservation purposes may be held either as a "specially protected"[15] conservation area (governed by the provisions of Part 4) or as "stewardship area" (governed by Part 5). Special protection may be conferred by the Minister under s 18 of the Act or s 18 protection may be deemed by the statute to apply, as it does under the provisions relating to former State forest park, described below at [45]–[47]. Under s 18(5) land with specific protection must "be managed in a manner consistent with the purpose or purposes concerned".

[39] Section 18 is the key provision in issue on the appeal. It contains in subs (7) the mechanism by which protected status can be revoked, turning formerly protected land into stewardship land which may be exchanged under s 16A or disposed of under s 26:

18 Minister may confer additional specific protection or preservation requirements

(1) Subject to subsections (2) to (4), the Minister may, by notice in the *Gazette* describing the land concerned, declare any land or interest in land, held under this Act for conservation purposes to be held for the purpose of a conservation park, an ecological area, for any other specified purpose or purposes, or for 2 or more of those purposes; and, subject to this Act, it shall thereafter so be held.

(2) The Minister shall give public notice of intention to give a notice under subsection (1); and section 49 shall apply accordingly.

...

(5) Every area held under this Act for 1 or more of the purposes described in subsection (1) shall be managed in a manner consistent with the purpose or purposes concerned.

(6) Nothing in sections 19 to 24 limits the generality of subsection (5).

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[15] Part 4 is under the heading "Specially protected areas".

> (7) Subject to subsection (8), the Minister may, by notice in the *Gazette*, vary or revoke the purpose, or all or any of the purposes, for which any land or interest held under subsection (1) is held; and it shall thereafter be held accordingly.
>
> (8) Before varying or revoking any purpose under subsection (7), the Minister shall give public notice of intention to do so; and section 49 shall apply accordingly.[16]

[40] "Stewardship area", by contrast, is negatively defined as conservation area that is not land held for one of the purposes described in s 18(1) (that is, as a specially protected area), and that is not a marginal strip or watercourse area.[17] Under s 25, stewardship area must be managed to protect its natural and historic resources.

[41] The principal difference between stewardship areas and specially protected areas is as to disposition of the land. Under s 16(1) (and subject to the Public Works Act 1981) "no conservation area or interest in a conservation area shall be disposed of except in accordance with this Act". While ss 16A and 26 provide powers of exchange or other disposition of stewardship land, no equivalent powers are provided in the Act for exchange or other disposition of specially protected areas.[18]

[42] Section 18(7) allows the Minister to "vary or revoke the purpose, or all or any of the purposes, for which any land or interest held under subsection (1) is held". Any such change in status under s 18(7) is made after public notification and the process prescribed by s 49 of the Act.[19] Revocation of all special protection has the effect that the land remains held for conservation purposes, but is stewardship land and may be disposed of or exchanged in accordance with the provisions of the Act, whereas protected land cannot be disposed of or exchanged.

[43] Sale or disposition of stewardship land (other than by exchange under s 16A) cannot be undertaken without public notice and rights of objection under s 49.[20] Even then, if the stewardship land to be disposed of is adjacent to protected

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16 Section 49, which is not reproduced in these reasons, provides for public notice and rights of objection.

17 Section 2(1), definition of "stewardship area".

18 Although there is a separate regime for disposal or exchange of marginal strips: s 24E.

19 Section 18(8).

20 Section 26(3).

conservation area, the Minister may not sell or dispose of it "unless satisfied that its retention and continued management as a stewardship area would not materially enhance the conservation or recreational values of the adjacent conservation area or land or, in the case of any marginal strip, of the adjacent water, or public access to it".[21]

[44] Under s 16A exchange is permitted if the Minister is "satisfied, after consultation with the local Conservation Board, that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of this Act". The full text of s 16A is:

> **16A Exchanges of stewardship areas**
>
> (1) Subject to subsections (2) and (3), the Minister may, by notice in the *Gazette*, authorise the exchange of any stewardship area or any part of any stewardship area for any other land.
>
> (2) The Minister shall not authorise any such exchange unless the Minister is satisfied, after consultation with the local Conservation Board, that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of this Act.
>
> (3) All land acquired by the Crown under this section shall be held for such conservation purposes as the Minister may specify in respect of that land by notice in the *Gazette*.
>
> (4) The Minister may authorise the payment or receipt by the Crown of money by way of equality of exchange in any case under this section; and all money so received shall be paid into the Department of Conservation Grants and Gifts Trust Account, and shall be applied, without further appropriation than this section, for the acquisition of land under this Act or the Reserves Act 1977 or the National Parks Act 1980.
>
> (5) The Minister or the Director-General may, on behalf of the Crown, do all such things as may be necessary to effect any exchange authorised under this section.
>
> (6) Upon the transfer of any stewardship area or any part of any stewardship area under this section, that land shall cease to be subject to this Act.

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[21] Section 26(2). It may be noted that the Director-General did not consider that marginal strips would be required. The Director-General did however take into account the enhancement of adjacent conservation areas in making the s 16A decision because such enhancement was contextually relevant in assessing the net benefit in the exchange.

(7) Nothing in section 26 or section 49 shall apply to the exchange of land under this section.

(7A) Nothing in section 40 of the Public Works Act 1981 applies to the exchange of land under this section.

(8) District Land Registrars are hereby authorised and directed to make such entries in registers and do all such other things as may be necessary to give effect to exchanges authorised under this section.

(c) Transitional arrangements for former State forest land

[45] In the restructuring of the land-holdings of the Crown under the Conservation Act and the State-Owned Enterprises Act 1986, former State forest land which was existing forest park and had not been identified for possible transfer to a State enterprise was held by the Department of Conservation for "conservation purposes" under the transitional arrangements in s 61 of the Conservation Act:[22]

61 Certain former State forest land to become protected area on commencement of Act

(1) Any land that, immediately before the commencement of this Act, was a forest sanctuary shall be deemed to have been declared to be held for the purpose of a sanctuary area by a notice under section 18(1) published in the *Gazette* on that commencement.

(2) Any land that, immediately before the commencement of this Act,—

(a) was a forest park; and

(b) was not shown on any plan lodged in the office of the Chief Surveyor for the land district in which it is situated (being a plan certified as correct for the purposes of section 24 of the State-Owned Enterprises Act 1986 by the Chief Surveyor) as being allocated for possible transfer to a State enterprise,—

shall, until it—

(c) is declared to be held for conservation purposes under section 7(1); or

(d) is vested in a State enterprise under the said section 24,—

be deemed to be a conservation park.

…

[22] The alternative under s 61(2A) (introduced by s 44(2) of the Crown Forest Assets Act 1989) did not apply to this land because it was never identified for allocation to New Zealand Forestry Corporation Limited.

(3) When any land to which subsection (2) applies is declared to be held for conservation purposes under section 7(1), it shall be deemed to have been declared to be held for the purpose of a conservation park by a notice in the *Gazette* under section 18(1).

(4) [Deeming continuation of wilderness area status.]

(5) [Providing for deemed wilderness area status on s 7 declaration that the land is conservation area.]

(6) [Deeming continuation of ecological area status.]

(7) [Providing for deemed ecological area status on s 7 declaration that the land is conservation area.]

(6A) [Exempting land allocated to New Zealand Forestry Corporation Limited immediately before enactment of the Crown Forest Assets Act 1989.]

(6B) [Correcting earlier declaration under s 7(1) for land to which subs (6A) applies.]

(7) [Providing an equivalent deeming to subs (3) for ecological area on declaration under s 7(1).]

(8) [Concerning management of ecological areas to protect the values for which they were originally dedicated under the Forests Act 1949 as ecological area.]

(9) Until it is—

(a) declared to be held for conservation purposes under section 7(1); or

(b) vested in a State enterprise under section 24 of the State-Owned Enterprises Act 1986,—

all land that is deemed by this section to be a conservation park, a wilderness area, or an ecological area shall be deemed to be held under this Act for conservation purposes; but neither it nor any interest in it shall be disposed of except by vesting as aforesaid.

(10) Nothing in subsection (9) restricts or prevents the granting under this Act of a concession over any land.

[46] Former State forest park is not stewardship area. It is deemed by s 61(2) to have, in addition to the status of land held for "conservation purposes", the additional protected status of "conservation park". The deeming transitional provision means that it is unnecessary for additional protection to be provided by notice published in the *Gazette* under s 18(1), as is required for conservation land not subject to the transitional arrangements in s 61. Although the deemed protected

status under s 61(2) ends if the land is vested by Order in Council in a State enterprise, the land continues to have the additional protected status of conservation park under s 61(3) once the option of vesting in a State enterprise is not taken and the land is declared by the Minister to be held for conservation purposes. That is because s 61(3) provides that former State forest park declared to be held for conservation purposes under s 7(1) is "deemed to have been declared to be held for the purpose of a conservation park by a notice in the *Gazette* under section 18(1)".

[47] In summary, the effect of the transitional provisions in s 61 is that land which was State forest park on the coming into effect of the Conservation Act is deemed to be conservation park until a decision is taken either to confirm that status by declaration under s 7(1) or 7(1A)[23] that the land is "held for conservation purposes" or by vesting the land in a State enterprise under s 24 of the State-Owned Enterprises Act. During the transitional deemed status, s 61(9) prevents the land being disposed of except by vesting in a State enterprise under s 24 of the State-Owned Enterprises Act. Once a declaration is made by the Minister that State forest park is "held for conservation purposes", it is no longer available to be vested in a State enterprise and cannot be disposed of except in accordance with the Conservation Act. It becomes "conservation park" by operation of s 61(3) because it is "deemed to have been declared to be held for the purpose of a conservation park by a notice in the *Gazette* under section 18(1)". It must continue to be held on that basis, which precludes its disposition (including by its exchange for other land), until revocation of protected status in accordance with the Act.

(d) Administration and management of conservation park and conservation areas

[48] Conservation park is one kind of specially protected area under Part 4. It must be managed in a manner consistent with the purpose of conservation park land (as s 18(5) requires) and in accordance with s 19(1):

> **19 Conservation parks**
>
> (1) Every conservation park shall so be managed—

[23] Although s 61 refers to s 7(1) declarations, we are of the view, as explained at [87]–[93], that this is properly to be read as a declaration by the Minister of Conservation to the same effect under s 7(1A).

(a) that its natural and historic resources are protected; and

(b) subject to paragraph (a), to facilitate public recreation and enjoyment.

[49] Under s 17A of the Act, the Department is also required to administer and manage all conservation areas and natural and historic resources in accordance with:

(a) statements of general policy approved under section 17B or section 17C; and

(b) conservation management strategies, conservation management plans, and freshwater fisheries management plans.

[50] Two such statutory planning instruments were in question in the present proceedings, the Conservation General Policy adopted by the then Minister in 2005 and the Hawke's Bay Conservation Management Strategy adopted in 1994.[24] Whether these instruments constrain the Minister's decision-making and the relevance of each to the decision under challenge was the subject of dispute which is considered below.[25]

(e) Marginal strips

[51] Section 24(1)(c) deems there to be reserved from the "sale or other disposition" of any land by the Crown a strip of land 20 metres wide extending along and abutting the landward margin of the bed of any river or any stream that has an average width of three metres or more. Such "marginal strips" are to be held in accordance with s 24C:

24C Purposes of marginal strips

Subject to this Act and any other Act, all marginal strips shall be held under this Act—

(a) for conservation purposes, in particular—

(i) the maintenance of adjacent watercourses or bodies of water; and

(ii) the maintenance of water quality; and

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[24] The relevant provisions of these documents are set out below at [55]–[61].

[25] See below at [128]–[149].

(iii) the maintenance of aquatic life and the control of harmful species of aquatic life; and

(iv) the protection of the marginal strips and their natural values; and

(b) to enable public access to any adjacent watercourses or bodies of water; and

(c) for public recreational use of the marginal strips and adjacent watercourses or bodies of water.

[52] The Minister may, under s 24A, decrease the width of marginal strips in specified circumstances before disposition and may declare dispositions of land to be exempt from the requirement to reserve marginal strips under s 24B. She may do so, however, only where satisfied (in the case of reduction of width) "that [the strip's] value in terms of the purposes specified in section 24C will not be diminished" and (in the case of exemption) "that the land has little or no value in terms of the purposes specified in section 24C; or … that any value the land has in those terms can be protected effectively by another means". The Minister may also authorise the exchange of any marginal strip for another strip of land, but only if "satisfied that the exchange will better achieve the purposes specified in section 24C".[26]

Statutory planning instruments adopted under ss 17B and 17D

[53] Under s 17A of the Act conservation areas must be administered and managed in accordance with statements of general policy adopted under s 17B and conservation management strategies adopted under s 17D. Both types of instrument are adopted following procedures including public participation prescribed by the Act.[27]

(a) The Conservation General Policy

[54] The Conservation General Policy in issue was adopted in 2005 after consultation and public notification. In a foreword to the Policy, the then Minister explained that its purpose was to "guide, and in some cases direct, my decisions as Minister" and to "guide and direct decisions of the Director-General of Conservation

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[26] Conservation Act, s 24E(2).

[27] Sections 17B(3) (in respect of statements of general policy) and 17F (in respect of conservation management strategies).

and other decision-makers under the legislation, such as the New Zealand Conservation Authority, conservation boards and fish and game councils".

[55] Chapter 6, in question in the present appeal, concerns "changes to public conservation lands".

[56] Policy 6(a) looks to "[l]and acquisition or exchange (including boundary changes)". It provides that such acquisition or exchange:

> … may be undertaken to manage, for conservation purposes, natural resources or historical and cultural heritage; or for the benefit and enjoyment of the public, including public access, where the land has international, national or regional significance; or where land acquisition or exchange will either:
>
> i. improve representativeness of public conservation land; or
>
> ii. improve the natural functioning or integrity of places; or
>
> iii. improve the amenity or utility of places; or
>
> iv. prevent significant loss of natural resources or historical and cultural heritage; or
>
> v. improve the natural linkages between places; or
>
> vi. secure practical walking access to public conservation lands and waters, rivers, lakes or the coast; or
>
> vii. achieve any other purpose allowed for under the relevant Acts.

[57] Under policy 6(b) (and subject to any statutory requirements), the classification of public conservation lands "may be reviewed from time to time to ensure that the classification of such lands continues to either":

> i. give appropriate protection and preservation for their natural resources, and/or historical and cultural heritage; or
>
> ii. give appropriate protection and preservation for their educational, scientific, community, or other special features, for the benefit of the public; or
>
> iii. enable integrated conservation management identified in conservation management strategies or plans; or
>
> iv. provide for access and enjoyment by the public where that is in accordance with the purposes for which the land is held; or

v. reflect the values of public conservation lands that are present; or

vi. enable specified places to achieve conservation outcomes in the future.

[58] Under policy 6(c), land disposal may be considered "where the legislation to which it is subject allows for disposal and the land has no, or very low, conservation values". Policy 6(c) does not apply to conservation park because the Conservation Act does not allow for its disposal. But even stewardship land may not be disposed of in conformity with policy 6(c) unless the land has "no, or very low, conservation values".

[59] Under policy 6(d), and subject to policy 6(c), "land disposal should not be undertaken where the land in question either":

i. has international, national or regional significance; or

ii. is important for the survival of any threatened indigenous species; or

iii. represents a habitat or ecosystem that is under-represented in public conservation lands or has the potential to be restored to improve the representation of habitats or ecosystems that are under-represented in public conservation lands; or

iv. improves the natural functioning or integrity of places; or

v. improves the amenity or utility of places; or

vi. improves the natural linkages between places; or

vii. secures practical walking access to public conservation lands and waters, rivers, lakes or the coast.

[60] The Department took the view that the policies 6(b)–(d) of the Conservation General Policy did not apply to the revocation determination: it was not undertaken as part of a general review exercise or because the land no longer had conservation values, but instead to achieve an exchange under s 16A. The hearing convenor also considered that policies 6(b)–(d) of the Conservation General Policy were not in issue. He thought that the only policy of relevance was policy 6(a):

> Policy 6b, for example, would apply if the C[onservation] P[ark] values were destroyed thus giving rise to a need to review the classification. Policies 6c and 6d are not relevant since, for purposes of exchanges, s 16A disapplies s 26 of the Act.

> The relevant policy is 6a. This provides for land exchanges (including boundary changes which provides strong support for the view that exchanges are not limited to boundary adjustments) to manage for conservation purposes various resources where the land has international, national, or regional significance or where the exchange will achieve one or more of the matters listed in paragraphs (i) to (vii).

(b) The Hawke's Bay Conservation Management Strategy

[61] Section 3.7 of the Hawke's Bay Conservation Management Strategy (adopted in 1994) concerns "land administration". Its aim is "[t]o achieve the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department". Of relevance is subs (ii), which provides:

> The Department will review the status of areas under its management and proceed to appropriately alter them if necessary. This may result in a change of status to give greater protection to natural or historic values, or it may result in disposals or exchanges of lands which have low natural or historic value.

[62] Section 3.7 too was thought by the Director-General and his advisers to be inapplicable to the decisions being undertaken to effect the exchange on the basis that it dealt with the Department's "own review of its land and any decisions it needs to make as a consequence about rationalising its holdings". The current case, by contrast, was said to be one where the Department was "dealing with a 3rd party which has approached it with a view to exchanging one block of land for another". In those circumstances, the Department took the view that the relevant test was s 16A and was one of "enhancement" through the exchange. If enhancement was achieved, "there [was] no impediment on the exchange of high value stewardship areas". The Department of Conservation report on which the hearing convenor relied summarised the position as being that "there is no inconsistency with the CMS". The hearing convenor considered that even if there had been inconsistency, s 3.7 of the Conservation Management Strategy could not constrain the scope of the Minister's discretion to exchange stewardship land. A concession determination, on the other hand, could not be inconsistent with the Strategy.[28]

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[28] See s 17W(1). Here, the Departmental draft report on the concession application (referred to above at [6]–[7]) took the view that the application was inconsistent with provisions of the Conservation Management Strategy which provided for concessions.

The decision in the High Court

[63] Palmer J accepted the Society's submission that the decision to revoke the status of specially protected land and the decision to exchange the resulting stewardship land were "legally distinct".[29] Although he considered that the Director-General's decision paper "came perilously close to risking the wrong legal test being applied to the revocation decision", he held that the Director-General did satisfy himself that there was "a good and proper basis for the revocation founded in conservation purposes interpreted broadly".[30] The Judge considered s 18(7) permitted consideration of wider conservation ends than the enhancement of conservation values of land managed by the Department which governed an exchange of land under s 16A.[31]

[64] The Judge took the view that the Director-General's decision to revoke the conservation park status of the 22 hectares was "rationally" within the purpose of the statute in promoting conservation,[32] "interpreted broadly".[33] Although he acknowledged the emphasis in the statutory definitions of "conservation" and "protection" on the "intrinsic values of natural and historic resources",[34] he did not accept the Society's argument that consideration of the conservation purposes of the Act when making a revocation decision was confined to the land in issue:

> [61] The reference to the promotion of conservation of "New Zealand's natural and historic resources" in the Long Title is to a broad and collective concept. The meaning of the definition of "conservation" and the meaning of "conservation purposes" in the Act must be interpreted broadly, as must the purpose of the Act. There is nothing in the text of the statute that requires the intrinsic value of a single resource to be preserved or protected if that diminishes conservation purposes in New Zealand more broadly conceived.

[65] Palmer J rejected the Minister's contention that the revocation decision could be made for the purposes of the exchange. He accepted that the revocation and

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29 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [2].
30 At [2]. See also at [75] and [80].
31 At [71].
32 At [73].
33 At [61].
34 At [59].

exchange decisions were distinct, relying on the legislative history of s 16A.[35] The 1989 Bill which inserted s 16A as introduced had not sought to confine exchanges of land to stewardship land alone.[36] A number of submissions were made to the Select Committee that the ability to exchange land should be restricted to stewardship land only. An amendment made at a late stage adopted that restriction.[37] Palmer J took the view that this legislative history meant that it was important to view the two decisions, for revocation and exchange, as distinct: "to view the process as a single step would be to obviate the clear Parliamentary intent not to provide a mechanism allowing specially protected land to be the subject of exchange".[38]

[66] Despite recognising the decisions to be distinct, Palmer J thought that the argument for the Society went too far in suggesting that "satisfying the land exchange test in s 16A for stewardship land is not a proper purpose, and is an irrelevant consideration, for the decision to revoke the status of specially protected land".[39] He considered the decision-maker was not required to "blind themselves" to the proposed exchange in making the revocation decision. That would be "artificial and inimical to good public administration".[40] Indeed, the Judge thought to refuse to take into account the merits of the proposed land exchange might well itself constitute the error of failing to take into account a relevant consideration.[41] He considered the revocation decision to be less confined than the exchange decision because it was not focused on enhancement of the conservation values of land managed by the Department. Rather, the revocation decision involved "a broader conception of conservation purposes than only reference to what happens on land managed by [the Department]".[42]

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35 See at [62]–[68].

36 If enacted, cl 11 of the Conservation Law Reform Bill 1989 (182–1) would have allowed the Minister to authorise "the exchange of any conservation area or any part of any conservation area for any other land".

37 Effected by Supplementary Order Paper 1990 (20) Conservation Law Reform Bill 1989 (182–2).

38 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [68]. See also Palmer J's discussion of the legislative history of s 16A at [64].

39 At [69]–[70].

40 At [70].

41 At [70].

42 At [71].

[67] For revocation, Palmer J considered there need be only a "good and proper basis, founded in conservation purposes", broadly understood.[43] He concluded that "the Director-General of Conservation revoking specially protected status of conservation land guided by a broad interpretation of conservation purposes *must* 'rationally be regarded as coming within the statutory purpose'".[44] The Judge accepted that the Department "did not pretend to be considering revocation independently of the exchange".[45] Because of this focus, the decision "came perilously close to risking the wrong legal test being applied to the revocation decision".[46] The decision paper had referred only to enhancement of the conservation values of land managed by the Department and "the statutory test in s 16A for the exchange was the only test identified in the decision paper".[47]

[68] Nevertheless, Palmer J concluded that the revocation decision was not unlawful, even though "the basis on which the decision was made is harder to establish".[48] The explanations given by the Director-General "could be taken to refer only to the narrower test for s 16A" (enhancement of "the conservation values of land managed by the Department", in the "Ruahine Forest park as a whole and the broader conservation estate").[49] But Palmer J thought it significant that the Director-General had said in evidence in the judicial review proceedings that he "took the view that the powers in the Act existed and focussed on whether the purpose of the Act was being advanced".[50] On the basis of that statement, Palmer J was "not satisfied, on the evidence, that the Director-General took too narrow a view of the revocation decision by applying to it the test for exchange":[51]

> He relied on his staff's broader assessment of the conservation values of the Smedley block, including future values, rather than the current values urged on [the Department] by the Company. And in his evidence he goes beyond the s 16A test and the land managed by [the Department] to say "[t]hat said, I am convinced that what was offered to and accepted by me well and truly

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43 At [71].
44 At [73], in reference to the approach adopted in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[55].
45 At [74].
46 At [75].
47 At [75].
48 At [78].
49 At [78].
50 At [79].
51 At [79]–[80] (footnotes omitted).

> meets the purpose of the Conservation Act and is a good outcome for the Department and conservation".
>
> I consider, on the evidence before me, that the Director-General did satisfy himself that there was a good and proper basis, founded in conservation purposes broadly interpreted, for the revocation decision. That is what he was required to do.

[69] Palmer J also dismissed the challenge based on failure to take into account the Conservation General Policy and the Hawke's Bay Conservation Management Strategy. He took the view policy 6(b) and s 3.7 did not apply to the revocation decision because in their own terms he considered they were directed only to general reviews of protected status, rather than the "specific decision about the proposed revocation of the existing status of the Forest Park land here".[52] On this basis failure to take the policies into account did not render the decision unlawful. Even had they applied, Palmer J thought they could not require a "narrow view of the purposes of the Act"[53] and that the decision could not be said to be rationally unconnected with the purposes of the Act.

[70] The challenge based on failure to consider the reservation of marginal strips from the exchange was considered by Palmer J to be "premature" because there had not yet been a disposition without such reservation.[54] He did, however, accept the submission of the Society that the exchange proposed would, when implemented, constitute a disposition of land under s 24 of the Act.[55] The Minister's and the Company's argument that the exchange was not a sale or disposition was "not tenable" based on the text and purpose of the legislation, including the wide definition of "sale" in s 2 of the Act and the "breadth of the additional clarification provided by subs 24(6)–(9)".[56] Since however the exchange had not been implemented, there was only a "proposed disposition".[57] Palmer J therefore declined to enter into further consideration of the question of reservation of marginal strips.

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52 At [84]. The terms of the relevant policies are set out above at [56]–[59].
53 At [85].
54 At [3] and [93].
55 At [89].
56 At [89].
57 At [90].

The Court of Appeal decision

[71] The Society appealed to the Court of Appeal against the finding that the decision taken by the Director-General to revoke the protected status of the 22 hectares of conservation park was lawful. The Minister and the Company cross appealed against the determination that the exchange constituted a disposition of land triggering the marginal strip reservation in s 24.

[72] The Court of Appeal majority rejected the contention on behalf of the Minister that the ultimate question under s 18(7) was whether revocation would secure an overall benefit to the conservation park and to "the overall conservation estate", so that "relative conservation values are a relevant consideration within the s 18(7) inquiry":[58]

> [68] … we are satisfied that any inquiry conducted under s 18(7) is limited to whether revocation is appropriate by reference to the particular resource. It does not allow a relativity analysis of the type undertaken by the Director-General, conducted from the viewpoint of what will yield the better net result or gain to the conservation estate, or a comparative inquiry into whether land offered in exchange has a higher intrinsic value. Once the land crossed the threshold of special protection – in the present case, by way of the Director-General's declaration and the deeming provisions under s 61 – its designation could only be revoked if its intrinsic values had been detrimentally affected such that it did not justify continued preservation and protection; for example, if the park purposes for which it is to be held were undermined by natural or external forces.
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> …
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> [70] When deciding to exercise his or her statutory discretion to revoke the status of a specially protected area under s 18(7) the Director-General is required to ask whether land which has satisfied the statutory criteria for special protection is no longer required for conservation purposes; that is, its intrinsic values no longer justify preservation and protection. Account must be taken of the purpose of the special protection – to *permanently* maintain its intrinsic values, provide for its appreciation and recreational enjoyment by the public, and safeguard the options of future generations – as well as the emphasis on *recreation* which distinguishes conservation parks from other specially protected areas. To be clear, the permanence of protection is not absolute: it depends on the land concerned maintaining the values for which it was designated.
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> [71] A proposal to exchange specially protected land will only be relevant to the s 18(7) inquiry if the Director-General is first satisfied that the specially protected area no longer merits its particular designation – in this

[58] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [67] per Harrison and Winkelmann JJ.

> case, a conservation park held for park purposes – and should be reclassified as a stewardship area. The Act does not allow the Director-General to exercise his or her revocation power by the touchstone of whether a decision will enhance the conservation values broadly construed of land managed by the Department. While that inquiry is appropriate to an exchange decision under s 16A(1), it is inapplicable where the revocation proposed is of a specially protected designation.

[73] Harrison and Winkelmann JJ considered that the Director-General's decision was based "predominantly if not solely on the s 16A criterion".[59] The Director-General had not considered whether the 22 hectares should no longer be held for conservation purposes. The revocation was rather undertaken "solely to progress the proposed exchange".[60]

> [74] Contrary to [Palmer J's] conclusion, we are satisfied that the Director-General was driven by the s 16A test. As [counsel for the Minister] accepted, the Director-General was undertaking a comparative analysis of land that enjoyed special protection with land that did not. The Director-General acknowledged throughout that he would not have revoked the status of the 22 hectares but for the exchange proposal. There is no difference, as [counsel for the Society] observed, between the Director-General making the revocation decision to enable the exchange and applying the test for exchange to the revocation decision. Whichever way it is viewed, the conflation of the revocation and exchange inquiries had the effect of circumventing a statutory prohibition which had been the subject of careful legislative consideration before its enactment.
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> [75] The Director-General did not inquire into whether the 22 hectares should be preserved because of its intrinsic values or protected in its current state to safeguard the option of future generations where the scientific evidence established its ecological significance. Nor did he inquire whether preservation or protection of the area in its current state was not practicable. Nor did he inquire why the 22 hectares should lose conservation park status when its inherent characteristics remained unchanged and otherwise deserving of protection and preservation. This factor assumes particular relevance where destruction of the 22 hectares – land previously deserving of special protection – was the inevitable consequence of his decision. The decision would free much of the land to be submerged and *cease to be land*; there could not be a more fundamental corruption of its intrinsic value.

[74] Harrison and Winkelmann JJ noted that Palmer J had accepted that treating the process as a "single step" would "obviate Parliament's clear intention not to provide a mechanism which allowed specially protected land to be the subject of

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59 At [72].
60 At [73].

exchange".[61] They considered that the three "successive and interrelated decisions" taken by the Director-General were, in substance, "a single step". The decisions were "never intended to stand alone".[62] What occurred was a "solitary decision to exchange the land by the means of revoking its designation".[63] If the Smedley land deserved protection, the Department could have sought to acquire it. Harrison and Winkelmann JJ concluded that the revocation decision was unlawful because:[64]

> In substance, if not in name, the Director-General applied the s 16A test in deciding whether to exercise his revocation power under s 18(7). Significantly, he did not identify the purpose or purposes of the Act served by the decision unless it was the purpose of global or overall enhancement provided by s 16A(2).

[75] The Judges in the majority concluded that, once land qualifies for special protection, instrumental values (such as, perhaps, in maximising the conservation estate) are foreclosed by the legislation. It requires the Director-General "to address only the intrinsic values of the land":[65]

> [56] … Specially protected areas attract that designation because they merit elevation from the holding-pen status of stewardship to the permanent preservation and protection of their natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public and safeguarding the options of future generations. Together, the purpose and interpretation provisions spell out a clear and dominant message. As Doogue J observed in *Buller Electricity Ltd v Attorney-General*, by reference to disposal of stewardship areas under s 26, the Act when viewed as a whole does not allow the Minister to sell or otherwise dispose of land unless satisfied that the land is no longer required for conservation purposes.[66]

[76] Ellen France P dissented from this decision. She accepted that the Director-General was obliged to make two separate decisions: "first, to revoke the status of the land as a conservation park so the land became stewardship land and, secondly, to exchange the stewardship land for other land".[67] In making the first decision, Ellen France P considered that the Director-General was not limited to

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61 At [78], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [68].

62 At [78].

63 At [78].

64 At [80].

65 At [57].

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

67 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [87].

consideration of the conservation values of the 22 hectares but could consider conservation purposes "more broadly". In agreement with Palmer J in the High Court, she considered it was sufficient that the Director-General was satisfied that there was "a good and proper basis for the revocation founded in conservation purposes interpreted broadly".[68] The Director-General was not confined to being satisfied that an exchange would enhance the conservation values of land managed by the Department.[69]

[77] The President considered that the Act's purpose in promoting conservation could be achieved in "various ways" and that, given that the definition of protection encompassed "augmentation, enhancement, or expansion", as well as maintenance, "the focus was appropriately on the [Ruahine Forest Park] as a whole".[70] She thought it was significant, too, that the revocation power was not constrained "other than by reference to the need for a public notification process", so that a "broad analysis is envisaged".[71] Ellen France P acknowledged the force of the submission that the Act provides for the exchange of stewardship land only, which she accepted supports the proposition that "only if the land has no conservation values can its special protection be revoked".[72] But she thought there were a number of contrary indications. She identified three.

[78] First, the President considered that s 61(9) "contemplates that conservation park land like that in issue here may be declared to be held for conservation purposes under s 7(1) and then disposed of" in a two stage process (revocation and then sale or exchange) because "otherwise there can be no disposal as s 61(9) anticipates".[73]

[79] The second matter identified by Ellen France P as indicating that revocation could be undertaken in order to effect a disposition of protected land was that "s 7(1A) on its face provides a means for the Minister to place the land in another

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68 At [87], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [2], [61] and [71].
69 At [87].
70 At [89].
71 At [89].
72 At [90].
73 At [91].

category including stewardship".[74] Even though this route had not been taken in the present case, Ellen France P thought the presence of s 7(1A) suggested that land covered by s 61 "may be able to be treated as stewardship land and then exchanged".[75] It may be noted immediately of this point that counsel for the Minister accepted in this Court that this reason is mistaken and that it does not avoid the deeming of protected status under s 61(3), as is discussed below at [87]–[93].

[80] The final reason given by Ellen France P for her dissenting view was that "at issue is the management regime that should apply to the land" and that "[i]t must be relevant to that analysis whether this is land that should be able to be exchanged":[76]

> If it is not, that would tell in favour of retention of the special protection. In that context, it must also be relevant that there is other land that could become part, in this case, of the [Ruahine Forest Park] and augment its features particularly the facilitation of public recreation and enjoyment.

[81] While the President thought the difference in conservation values of stewardship areas and conservation parks should not be downplayed, she thought it was of "some relevance" that the difference in the identified values was in the "additional requirement that conservation parks are to be managed in a way that facilitates public recreation and enjoyment".[77] She pointed out that there were different degrees of protection provided within the regime of specially protected areas. In that connection, Ellen France P considered there was force in the submission that the factors primarily justifying maintaining the conservation park status "over and above stewardship" – public recreation and enjoyment – "were not present in relation to the 22 hectares because of difficulties with access". By contrast, "the [Ruahine Forest Park] as a whole would be enhanced in terms of public recreation and enjoyment by the addition of the Smedley Block which would not involve difficulties in terms of access".[78]

[82] In accordance with the opinion of the majority, the decision under s 18(7) was set aside, with a direction that the application be reconsidered in accordance

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74 At [92].
75 At [92].
76 At [93].
77 At [94].
78 At [94].

with the terms of the judgment.[79] The Court of Appeal took the view that the majority determination that the revocation decision was unlawful made it unnecessary to consider the alternative ground of appeal based on failure to take into account the Conservation General Policy and the Hawke's Bay Conservation Management Strategy.[80] It also determined that "[t]he cross-appeal must also be dismissed".[81] It is not clear why that view was taken; the determination of the cross-appeal (relating to marginal strips) was not strictly speaking dependent on the outcome of the appeal. Without resolution of the appeal against application of s 24, the High Court determination that an exchange is a disposition of land which gives rise to the reservation of marginal strips along any watercourses on the land of three metres in width or more stands. This determination affects the course ahead for the Company even on the basis on which the majority allowed the appeal.

The appeal to this Court

[83] The Minister and the Company appeal with leave to this Court against the decision of the Court of Appeal that the revocation decision was unlawful.[82] They also appeal against the dismissal of the cross-appeal against Palmer J's determination that s 24 applies to the proposed exchange of land, with the effect that marginal strips must be reserved (unless the Minister invokes an exception). The Society supports the reasons given by the majority in the Court of Appeal for holding that the Minister erred in applying the s 16A test for exchange when making the revocation decision. It also supports the majority decision that it was an error for the Minister to have failed to address whether revocation of protected status was appropriate in terms of the intrinsic conservation qualities of the land. In addition, the Society maintains that the decision was also invalid because it was made without taking into account provisions of the Conservation General Policy and the Hawke's Bay Conservation Management Strategy (points the Court of Appeal had treated as not requiring resolution).

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79 At [84].
80 At [81].
81 At [81].
82 Leave was granted by this Court in *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2016] NZSC 164.

[84] The four principal questions on the appeals are:

(a) whether the Court of Appeal was right to hold that the power to revoke deemed conservation park status under s 18(7) turned on the intrinsic conservation values of the resources contained in the 22 hectares rather than enhancement to the conservation estate in the proposed exchange under s 16A;

(b) whether the revocation decision was wrongly driven by the exchange, as the Court of Appeal concluded;

(c) whether the Director-General was required to take into account the Conservation General Policy and the Hawke's Bay Conservation Management Strategy; and

(d) whether Palmer J was correct to hold that the s 24 of the Conservation Act applied to the proposed land exchange, triggering marginal strip reservation.

These points, the critical questions on the appeal, are considered at [109]–[161].

[85] Before addressing them, however, it is convenient to deal with five subsidiary matters that arose in argument or on the basis of the minority reasoning in the Court of Appeal. The first two arise out of the transitional status of the forest park land in issue. They are:

(a) whether s 7(1A) of the Act provided an alternative mechanism for lifting the protected status of the land by avoiding its deemed status as conservation park under s 61(3); and

(b) whether s 61(9) anticipates disposal of former State forest land.

[86] The three further points, which overlap to some extent, relate to:

(c) the differences between stewardship land and conservation park;

(d) the effect of recreational opportunities; and

(e) an argument that revocation in order to augment the conservation park is envisaged by ss 18(5) and 19(1).

These five subsidiary matters are dealt with at [87]–[108] before dealing with the principal questions for the appeal.

Section 7(1A)

[87] Ellen France P acknowledged that there was force in the argument accepted by the majority in the Court of Appeal that the fact that the Act permits exchange only of stewardship land indicates that "only if the land has no conservation values can its special protection be revoked".[83] But she identified three contrary indications. One was the presence of s 7(1A), which she thought "on its face provides a means for the Minister to place the land in another category including stewardship" and which suggested that land covered by s 61 "may be able to be treated as stewardship land and then exchanged".[84] The Minister no longer relies on the point,[85] but it was repeated in this Court by the Company, although not greatly pressed in oral argument. We therefore consider it appropriate to explain why recourse to s 7(1A) would not have allowed the Minister to avoid the effect of s 61(3) in deeming the former State forest park land to be conservation park.

[88] In argument in the Court of Appeal, the Minister submitted that s 7(1A), although not relied on by the Director-General, provided the Minister with the option of treating the land as stewardship land, rather than it being deemed to be conservation park under s 61(3), requiring revocation of that status before it could be exchanged.[86] The submission was made on the basis that s 61(3) refers to s 7(1) but not to s 7(1A). In the Court of Appeal, the argument was rejected by the majority on the basis that once the Director-General had given notice that he was proceeding

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83 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [90].

84 At [92].

85 See below at [89].

86 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [43].

under s 7(1), the s 7(1A) route was not available.[87] It seems to us however that the Court of Appeal was correct to note in addition that the legislative history of s 7(1A) indicates that it was intended simply to obviate the need for a second Minister to act when the holding Minister was the Minister of Conservation.[88]

[89] In this Court, counsel for the Minister accepted that s 7(1A) is properly treated as "an addendum to s 7(1)". We consider that the concession was rightly made. The effect of the addition is that in cases such as the present where the only Minister responsible is the Minister of Conservation, the Minister of Conservation alone may make the declaration that the former forest park is held for conservation purposes. That results from both the sense of s 7 read as a whole and the legislative history.[89]

[90] As the Court of Appeal rightly noted, s 7(1A) is a "technical amendment".[90] Any other reading of s 61 would leave an unaccountable gap in the scheme of protection for forest park, wilderness areas, and ecological areas according to whether the s 7 decision is taken by two Ministers under s 7(1) or by the Minister of Conservation alone under s 7(1A). It would, inconveniently, require protected status to be considered (and notice given) whenever the transitional status of land is determined to be conservation land.[91] That is not the scheme of s 7 and no policy which would justify a different result is indicated by the legislation or its history.

[91] Moreover s 7(1A) is in its own terms dependent on s 7(1) because it is declared to be "[n]otwithstanding subsection (1)" and to apply "in the case of any land to which section 61 or section 62 applies". The only basis on which the additional provision is required and the "notwithstanding" introduction to it is necessary is that, in the case of land to which s 61 or 62 applies, the Minister of

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87 At [44].

88 At [45].

89 As Harrison and Winkelmann JJ note at [45], the relevant provision first appeared in cl 3 of the Conservation Amendment Bill (No 2) 1993 (251–1) with the explanatory note stating its effect was to "[amend] section 7 of the principal Act to enable the Minister of Conservation to declare certain land ... to be held for conservation purposes without the need to obtain the consent of the Minister responsible for the department or agency having control of the land".

90 At [45].

91 If the various deeming provisions within s 61 did not apply to declarations made under s 7(1A), the Minister would need to confer any additional protection appropriate for the land in question using the s 18(1) procedure. That requires public notice and consultation in accordance with s 49: s 18(2).

Conservation alone has control of the land. Section 61 (which applies to the 22 hectares in issue) makes certain former State forest land (including forest park) "protected area" on commencement of the Conservation Act. Section 62 provides that other State forest land not requiring protected status is to be stewardship land. The transitional provisions in ss 61 and 62 therefore achieve for State forest land the same sorting of land declared held for conservation purposes which has to be additionally undertaken for other conservation land through s 18(1).

[92] The sense of s 7 read as a whole does not suggest that s 7(1A) provides an alternative route which, if taken, avoids the deemed conservation park status in s 61(3). Section 7(1A) is properly read, in context, as an auxiliary section to s 7(1) which affects the way in which a declaration can be made (by the Minister of Conservation alone). It does not alter the fact that the declaration made by the Minister is to the same effect as the s 7(1) declaration and that s 61(3) preserves the protected status of forest park through deeming it to be conservation park once declared to be held for conservation purposes. The upshot is that there is no basis to avoid s 18(7) and the public process for revocation of the special protection for the deemed conservation park status of the land. This reading of s 7 means that the references to s 7(1) in s 61 are properly read to include s 7(1A). Although s 61(3) deems the protected status under s 18 to apply on declaration that the land is held for conservation purposes "under s 7(1)", the sense and scheme of the legislation is that the status attaches equally where the declaration is made under s 7(1A).

[93] It has been necessary to deal with the point at some length because the contrary view of s 7(1A), if right, would suggest that State forest park does not inevitably obtain protected status and can be treated by the Minister as stewardship land and exchanged. If so, it would undermine the argument that the scheme of the legislation is that revocation of protected status is appropriate only if the intrinsic values of the land do not justify it. So, although the Minister had elected to proceed under s 7(1) and by way of revocation, the availability of the less onerous route was treated by Ellen France P as an indication that the distinct revocation decision should not proceed on an assumption that there were intrinsic values deserving of protection in the land which inhibited reliance on the intended purpose of exchange, because

the status of the land "could have been altered under s 7(1A)".[92] The principal answer given by the majority in the Court of Appeal (that the Minister chose to proceed under s 7(1)) does not answer the use of s 7(1A) so understood as an aid to the interpretation of what was required in making the revocation decision. The better answer to the point made by Ellen France P is that a declaration by the Minister of Conservation under s 7(1A) does not avoid the application of s 61(3).

Section 61(9)

[94] A further reason given by Ellen France P for not treating the limitation of exchanges of land to stewardship land as a pointer to focus on the intrinsic conservation values of the land was that she considered s 61(9) contemplated that conservation park might be declared to be held for conservation purposes and then disposed of in a "two-stage" process. Otherwise, she thought, there could be "no disposal as s 61(9) anticipates".[93]

[95] We do not consider that s 61(9) "anticipates" disposal of land except through vesting in a State enterprise under s 24 of the State-Owned Enterprises Act (one of the two ways in which transitional status for Crown forest land is brought to an end). Section 61(9) is part of the machinery by which former State forest land was either vested in State enterprises or could be vested under s 7(1), bringing to an end the period of transition. Section 61(9) provides:

> Until it is—
>
> (a) declared to be held for conservation purposes under section 7(1); or
>
> (b) vested in a State enterprise under section 24 of the State-Owned Enterprises Act 1986,—
>
> all land that is deemed by this section to be a conservation park, a wilderness area, or an ecological area shall be deemed to be held under this Act for conservation purposes; but neither it nor any interest in it shall be disposed of except by vesting as aforesaid.

[96] The "vesting as aforesaid" is a reference to vesting in a State enterprise under s 24 of the State-Owned Enterprises Act. It does not anticipate disposal following

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92 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [92].

93 At [91].

declaration of holding for conservation purposes in a "two-stage" process which is comparable to the process adopted here by the Director-General in order to exchange the subject land. Section 61(9) simply makes it clear that, although deemed protected areas are held "for conservation purposes", the only basis for disposition while they have protected transitional status is by vesting in State enterprises.[94] Revocation of protected status under s 18(7) is necessary before disposition by exchange (under s 16A) or other disposition (under s 26) could be undertaken. That circumstance does not support the view that revocation is justified in the scheme of the Act in order to effect a disposition unless protected status is inappropriate. Revocation cannot be used to avoid the prohibition on exchanges or disposition of conservation areas that justify special protection.

Stewardship land and conservation park

[97] It was suggested in argument that comparison of the basis on which conservation park and stewardship land is to be managed under ss 19(1) and 25 respectively indicates that the difference between the two categories is slight. It is the case that both sections require the subject land in the two categories to be managed to protect its natural and historic resources. But, as the Court of Appeal noted, stewardship areas are conservation areas for which no end use has been decided.[95] In those circumstances, and given the definitions of "conservation", "protection", and "preservation", it is consistent with the purpose of the Act that the management of stewardship areas should be generally consistent with the management of conservation park. Otherwise, options for the future, including additional protection such as can be provided under s 8 or s 18(1), would be eroded during the period of stewardship.

[98] The critical distinction between stewardship areas and additionally protected areas for the purposes of revocation is not the way in which they are managed while held by the Minister. It instead reflects the conservation values present in the land which make additional protection appropriate, including the protection against

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94 Whether there are any constraints on vesting in a State enterprise is not a matter that is before us and is one on which we express no view.

95 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [11], citing (11 December 1986) 476 NZPD 6139.

disposal or exchange. The majority Judges in the Court of Appeal were right to reject the submission that for all practical purposes stewardship area and conservation park can be treated the same.[96]

Recreation

[99] Conservation park must be managed to facilitate public recreation.[97] The suggestion was made in submissions that, since the 22 hectares in issue is not used for public recreation, it is more appropriately classified as stewardship land rather than conservation park.

[100] We consider the majority in the Court of Appeal was correct to reject this submission. As Harrison and Winkelmann JJ said, there is no "revolving door between the designations of stewardship area and conservation park based on whether the land concerned happens to be an arena for recreation at a given moment".[98]

[101] The importance of recreation in the scheme of the Act should not be over-stated. Although it may be accepted that suitability for recreation is an attribute that may be relevant to whether conservation land should be declared to be conservation park or whether existing conservation park status should be revoked under s 18(7), the relevance of recreational value in the assessment must depend on context and in particular whether the land has other conservation values which justify protection.

[102] Recreation is a subsidiary consideration to protection of natural and historic resources, as s 19(1) makes clear in relation to the management of conservation parks. In the case of the revocation of existing conservation park status, the significance of recreational value depends on the other conservation values which may justify protection against disposition. It should be noted that there is no suggestion in the Director-General's decision in the present case that other important conservation qualities intrinsic to the subject land were not present. They clearly

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96 At [61].

97 Conservation Act, s 19(1)(b).

98 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [62].

were accepted to be present on the scientific reports and on the face of the decisions taken by the Director-General.

Revocation as park management?

[103] Counsel for the Minister sought to characterise revocation under s 18(7) as a power able to be used not only where the subject land no longer warrants protected status but for the purposes of management of the conservation park. It is said that, in accordance with the restriction of the powers of management under s 18(5), it was sufficient that revocation be consistent with protection of the conservation park, as s 19(1) (to which s 18(5) is subject) requires. Since "protection" is defined to include not only maintenance of a resource in its current state (so far as practicable) but also "its augmentation, enhancement, or expansion", it is argued that revocation can be used as part of the management of a conservation park in order to achieve its enhancement. Revocation to facilitate the proposed exchange on this basis is within the purpose of the statute because it leads to enhancement of the conservation park through the addition of the Smedley land.

[104] Since the management of the forest park on this argument requires enhancement to the actual conservation park (through application of s 19(1)), the use of s 18(7) to achieve conservation gain would be limited to enhancement to the particular conservation park. That effect would answer concerns that departing from a focus on the values intrinsic to the subject land would potentially put much of the protected conservation estate in play because the possibilities for benefit in an exchange following revocation of protected status would be extensive. (If this were the case, the deliberate restriction of s 16A to stewardship land would be undermined.) In argument, counsel for the Minister disclaimed any suggestion that land held as conservation park could be traded for net gains to the conservation estate more generally or that the prospect of such gain would justify revocation of its protected status. Sections 18(5) and 19(1) would, he submitted, act as a brake on inappropriate use of the s 18(7) power. Revocation to achieve gains other than in enhancement of the particular conservation park would be impermissible as it would not comply with the requirement to manage the park in accordance with ss 18(5) and 19(1).

[105] It is difficult to accept that revocation of protected status of part of a conservation park is properly treated as an aspect of the management of the conservation park. Such argument is not reconcilable with the structure of s 18. Section 18 (set out at [39]) is not a provision principally concerned with management. As its heading suggests, it is concerned with the conferral of "additional specific protection or preservation requirements". It provides separately for the manner in which land obtains and loses protected status and the manner in which it is to be managed while it has protected status.

[106] Section 18(5) is concerned with the management of land while it is held for the particular conservation purpose. Section 18(7) is not concerned with the management of protected land and is not controlled by s 18(5) any more than the powers to give land additional protection under s 18(1) are powers of management controlled by s 18(5).

[107] Sections 18(5) and 19(1) do not therefore provide a brake on use of the s 18(7) revocation power. Unless protected status for the subject land can be revoked only where the conservation values intrinsic to it no longer warrant the protection, there is nothing explicit in s 18(7) which would prevent a revocation of protected status to achieve general conservation purposes. The gain achieved might not entail any commensurate augmentation of the particular conservation park or otherwise protected area or the resources contained in it (even if it might be that a subsequent exchange under s 16A would have to be for local gain).[99] It might entail something of benefit to conservation generally (as, perhaps, in the provision of resources for predator control). If s 18(7) can be used to revoke protected status in order to achieve net conservation gains, irrespective of the intrinsic values of the land, it could be used equally for gains obtained by dispositions other than by exchange in which s 16A does not apply. Additionally, if accepted, the ability to revoke protected status for reasons other than the intrinsic nature of the protected land would allow revocation of protection for ecological areas or other land subject

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[99] It is true that in the context of exchanges under s 16A, the requirement in s 16A(2) to consult with the local Conservation Board may suggest that enhancement of conservation values in an exchange of stewardship land is limited to local enhancement. It is unnecessary to resolve the extent to which enhancement through exchange which is not closely connected with the land affected might be possible under s 16A. The question is not before us.

to additional protection if disposal would lead to a general conservation gain. For the reasons given at [109]–[117] below, we do not accept that interpretation of s 18(7).

[108] In any case, although "protection" is defined to include "augmentation, enhancement, or expansion", that is "in relation to a resource". It strains the scheme of s 19(1) to treat the obligation to manage the park to protect "*its* natural and historic resources" as permitting revocation of the status of protected land in order to dispose of it to obtain a gain for the park to which it belongs. Protection of the resources in the subject land and not augmentation of the park as a whole is required in the management of the land under ss 19(1) and 18(5). As the Court of Appeal majority pointed out, a revocation decision under s 18(7) is necessarily specific to protected land which is the subject of the revocation.[100]

Does revocation depend on values intrinsic to the land?

[109] The enactment in issue, s 18(7),[101] is not a general power to do whatever the Minister reasonably thinks will promote the conservation of New Zealand's natural and historic resources. It is a power to revoke specially protected status of particular conservation land. The power must be exercised for the purposes for which it is conferred. They are ascertained from s 18(7) itself and its place in the scheme of the Act, as s 5 of the Interpretation Act 1999 requires. That statutory context necessarily channels the choice available to the Minister.[102]

[110] It is not helpful in this context to invoke, as Palmer J in the High Court did,[103] the statement made by this Court in *Unison Networks Ltd v Commerce Commission*.[104] There the Court was considering a broad power given to an expert regulator to set thresholds for the price regulation of electricity lines companies which operated as regional monopolies. In that context, the expert body was

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100 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [68].

101 "Enactment" is defined as "the whole or a portion of an Act or regulations": Interpretation Act 1999, s 29.

102 In addition, and as explained below at [129]–[135], the choice available to the Minister was affected by the statutory planning instruments adopted under Part 3A of the Act.

103 See above at [67].

104 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[55].

relatively unconstrained in identifying the broad policy considerations it relied on. The present case is very different. It entails not development of regulatory policy but application of the policies identified in the Act and in planning instruments made under the Act to specific resources in conservation land subject to special protection. There is no occasion to exercise the power conferred in s 18(7) by reference to promotion of conservation generally. Unless the determination is in accordance with the policies identified by the scheme of the Act and in the planning instruments adopted under the Act, the effect would be to confer on the Minister a policy-making function outside Part 3A which would undermine the legislative scheme.

[111] The approach taken in the High Court that a revocation decision under s 18(7) can properly be made simply for a purpose "rationally" connected with the overall purposes of the Act, "broadly" understood, is not able to reconciled with the scheme of the Act. The definitions of "conservation", "preservation" and "protection" which are imported into s 18 suggest such decisions turn on whether the "additional specific protection or preservation requirements" with which Part 4 of the Act is concerned remain appropriate. The conservation purposes for which land is held under s 18(1) (as "conservation park, an ecological area, for any other specified purpose or purposes, or for 2 or more of those purposes") are properly the focus. It is necessary to consider what is appropriate to protect the "intrinsic values" of the land concerned (a focus required by the definition of "conservation").

[112] The Director-General's reliance on what the High Court described as the "broader assessment of the conservation values of the Smedley block"[105] did not focus on the resources in the land for which revocation of protection was proposed. Rather, the focus was on the enhancement through the exchange of the conservation values of land managed by the Department and an assertion of general promotion of the purposes of the Act, without their further identification. These were the considerations relevant to an exchange under s 16A of stewardship land, but they were not appropriate for the s 18(7) determination of revocation of the status of conservation park when the "conservation purposes" which prompted protection were the natural and historic resources of the land and waters.

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[105] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [79] per Palmer J.

[113] A determination to revoke protected status under s 18(7) is not a decision taken within "a [broad] conception of conservation purposes".[106] A "good and proper basis" for revocation cannot be found in "broader values" than those affected by the revocation of protection in respect of the resources found in the protected land. We agree with the majority in the Court of Appeal that an enquiry under s 18(7) required focus on the particular resources. The Director-General could not fulfil the statutory responsibility if satisfied simply that there was a "good and proper basis founded in conservation purposes, broadly conceived, for revoking the special protection status of conservation land, rather than for the purpose of protecting the land concerned".[107] In any event, no such foundation was identified beyond the assessment of net gain in terms of the s 16A exchange applicable to stewardship land, not land with pre-existing protected status.

[114] It was not enough that on a "relativity analysis" there was considered to be a margin, on balance, in favour of the Smedley land in the swap.[108] Gain in exchange of land was not the right question in considering revocation of protected status. If it were, there would be inevitable collapsing of the two decisions as to revocation and exchange, despite the recognition that they are distinct, and despite the legislative history which made it clear that gain in exchange of land did not justify exchange of additionally protected land but was available only in respect of stewardship areas.[109]

[115] Revocation under s 18(7) must be assessed by reference to the particular resources affected and does not lend itself to a calculation of whether an exchange of land will lead to net gain to either the forest park as a whole or the wider conservation estate. Nor is it sufficient to undertake a comparative assessment as to whether land proposed to be obtained in an exchange has higher intrinsic conservation values. Revocation of protected status is open only if the conservation values of the resources on the subject land no longer justify that protection.

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106 Contrast *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [71].

107 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [53].

108 At [68].

109 See above at [65].

[116] Although Harrison and Winkelmann JJ gave as an example of when revocation would be warranted whether the park purposes had been "undermined by natural or external forces", we do not consider that they were suggesting that only complete destruction of the values justifying protection and preservation could warrant revocation.[110] Rather, as they said, the designation could be revoked only if the "intrinsic values" of the land "did not justify continued preservation and protection" so that the status of conservation park was inappropriate.[111]

[117] If protected status can be revoked where net conservation gain can be achieved through exchange or sale, the scheme of the Act in withholding the ability to exchange or sell protected land is effectively undone. That consideration in our view strongly supports the conclusion that the scheme of the legislation requires the decision to revoke to be based on the conservation qualities of the resources on the subject land. If they are such as to warrant continued protection against disposal, revocation is not in accordance with the legislative scheme.

Was the revocation decision wrongly driven by the exchange?

[118] It was not suggested in any of the reports or in the decision taken by the Director-General that the 22 hectares did not warrant protected status. As was made clear in the report of the hearing convenor referred to at [20], the view that was taken by the Department and acted on by the Director-General was that revocation of conservation park could occur *either* if the values in the land were such that it was "not worthy of Conservation Park status" *or* if the revocation was for the purposes of an exchange of land that would benefit the land administered by the Department, in application of the enhancement test in s 16A. The second basis was relied on.

[119] In the event, the assessment of net gain in the exchange was comparatively evenly balanced. The comparative approach adopted in application of s 16A meant that the Director-General did not assess the important conservation values against retention of additional protected status. The revocation decision followed from the simple conclusion of comparative advantage. Erosion of protection is inevitable if

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110 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [68].

111 At [68].

this general approach is adopted because it is likely there will often be other land that would come out ahead on the sort of comparative assessment here undertaken.

[120] Mr Salmon for the Society makes the point that the concession report (referred to at [6]–[7]), although apparently preliminary, addressed the intrinsic qualities of the land affected and illustrates the approach that should have been taken when considering revocation. The draft concession report addressed the fact that nationally significant values would be lost in the inundation for which the concession was sought.

[121] The Society says that it was an error in the revocation decision for the Director-General to consider only the exchange offered by the Company. If the Smedley land was worth adding to the conservation park because of its conservation values, other options for its acquisition should have been considered before an exchange which entailed destruction of the conservation values in the 22 hectares.

[122] The approach taken in this case is said by the Society to have been novel. It is said that no case has arisen where specially protected status has been revoked except when land did not have the conservation values to justify it. That the approach is novel perhaps gains some support from the indications in the Conservation General Policy that classification of land is concerned with the protection of its resources, and the indications in the Hawke's Bay Conservation Management Strategy that change to protected status turns on "low" natural or historic value. It is also indicated by the view taken by the hearing convenor in his report (referred to at [60] above) that policy 6(b) of the Conservation General Policy dealing with reclassification would apply if reclassification was necessary because conservation values in the conservation park had been destroyed.

[123] There is force in the submissions advanced for the Society as to the appropriateness of the comparison undertaken in the present case. As already indicated, however, the decision to revoke was more fundamentally flawed. We are unable to accept that a comparative approach conforms to the scheme of the legislation, for reasons which substantially accord with those given by Harrison and Winkelmann JJ in the Court of Appeal. It was never decided that, absent the

exchange, it was inappropriate to continue protection for the 22 hectares. The assessment was all in connection with the exchange and on an either/or basis. As a result the distinction between revocation and exchange was collapsed and the decision was made for the wrong purpose. The decision here to revoke the status of high value conservation park land was for the sole purposes of enabling a land exchange to occur.

[124] Palmer J was therefore right to conclude that an exclusive focus on the relative values in the proposed exchange (the s 16A question) was the wrong approach. We are however unable to agree with his further conclusion that the Director-General's decision to revoke the protected status of the 22 hectares was based on considerations other than the net benefit he saw in the proposed exchange.[112] The reliance of the Director-General on the advice he received as to the conservation values of the Smedley land (current and potential) and his conclusory evidence that he was "convinced that what was offered to and accepted by me well and truly meets the purpose of the Conservation Act and is a good outcome for the Department and conservation" do not overcome the error of treating the revocation decision as turning on the s 16A assessment of net advantage in the exchange. Ellen France P took the view that the Director-General had received reports and considered the conservation values of the 22 hectares.[113] But in our view it is clear from the decision and the reports on which it was based[114] that these values were assessed, not in their own terms, but only by comparison with the values identified in the Smedley land and its potential when enhanced through the obligations imposed through the conditions.

[125] The scientific assessments and the decision which relied on them to revoke conservation park status for the 22 hectares have been described at some length at [14]–[31]. The advice given to the Director-General (including the scientific assessment of the ecological and landscape values) was all directed at the

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112 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [79]–[80].

113 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [98].

114 Referred to above at [14]–[31].

comparative assessment required by s 16A. It did not address the question of appropriate protection for the values represented by the land and water themselves.

[126] The conclusion expressed in his evidence in the High Court by the Director-General and relied on by Palmer J[115] is based on the same comparative assessment of the relative merits for the conservation estate in the exchange. The scientific evidence and the reports accept that there are some significant ecological and landscape values in the 22 hectares. The decision to revoke the existing protection was taken on the basis that the Smedley land offered a net gain, but it is clear that the matter was finely balanced.[116] It is nowhere suggested that protected status for the 22 hectares was inappropriate absent the exchange. At no point was the question asked whether the loss of the conservation park land was acceptable in its own terms, leaving aside the net gain in the exchange. The Department did not assess whether, in the absence of the swap, the status of the 22 hectares as conservation park was inappropriate. As the majority in the Court of Appeal correctly concluded, the decision to revoke the status of land was "driven by the s 16A test".[117] That is evident from the scope of the delegation instrument,[118] the Director-General's decision letter[119] and the terms of the advice the Director-General received from his staff as to the purposes for which the s 18(7) power could be exercised.[120]

[127] In summary, we agree with Harrison and Winkelmann JJ that the revocation decision was unlawful because the Director-General was driven by the s 16A test for exchange.[121] It was acknowledged throughout that revocation of the special protected status of the 22 hectares was justified only on the basis of the proposed exchange. The conflation of the two steps circumvented the statutory prohibition on exchange of other than stewardship land. There was no assessment of whether the intrinsic qualities of the land warranted its special protection, despite the scientific

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115 See above at [30]–[31] and [68].

116 One of the reports put the balance in terms of habitat and species values "marginally" in favour of the 22 hectares of forest park land: see above at [15].

117 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [74].

118 See above at [13].

119 See above at [25]–[29].

120 See above at [20], [22] and [23].

121 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [74].

reports which showed it had significant conservation values. There was no consideration of whether continuation of protected status was inappropriate or indeed whether the additional protection of ecological area should have been applied to the 22 hectares following the identification of ecological values in the scientific report.[122] Nor is there any discussion of how the values in the unprotected Smedley land might have been protected without the exchange. As the majority in the Court of Appeal remarked, the Department was not concerned with the correct level of protection.[123] The distinct steps were in fact all driven by the proposed exchange.

Effect of the statutory planning instruments

[128] Two principal reasons were put forward on behalf of the Minister in response to the claim that the Director-General failed to make the revocation decision in accordance with the policies in the Conservation General Policy and the Hawke's Bay Conservation Management Strategy. First, it is submitted that the Minister and her delegate, the Director-General, were not bound by the Conservation General Policy and Conservation Management Strategy and that these documents cannot constrain the exercise of statutory powers conferred on the Minister. Secondly, it is said that the Director-General was correct to take the view that, of these planning instruments, only policy 6(a) of the Conservation General Policy was relevant and that he properly took that policy into account.

(a) Was the Minister bound by the planning instruments?

[129] In their statements of defence, the Minister and the Company admitted that "subject to the Act", "the Department is required to administer the conservation land in accordance with the Conservation General Policy and any operative Hawke's Bay Conservation Management Strategy". Instead, they relied principally on lack of relevance of the provisions of the planning instruments the Society referred to (a matter we consider at [136]–[147]), a position with which the High Court agreed.[124] On appeal to this Court, however, the Minister and the Company argued in addition that the planning instruments did not bind the Minister and could not constrain her

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122 At [75]–[76].
123 At [77].
124 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [83]–[84].

decision-making power under s 18(7). This argument echoes the view taken by the hearing convenor in respect of the Conservation Management Strategy which was that, even if the Director-General's decision was inconsistent with its terms, "[d]ecisions to exchange are made by the Minister and the wording of section 3.7 of the [Conservation Management Strategy] does not constrain the scope of the Minister's discretion".[125]

[130] We consider that the Minister and the Director-General as her delegate were bound by s 17A to exercise the power to revoke protected status under s 18(7) in accordance with the policies expressed in the planning instruments formally adopted under the Act. The planning instruments adopted under the Act are significant in its scheme and provide the context for the choices left to the Minister and the Director-General and reasonably to be taken by them, for reasons which have been given in rejecting the related argument based on a "broad" approach to rational connection with the purposes of the Act.[126] The purposes for which the power under s 18(7) may be used are shaped by the purpose to be taken from the Act as a whole, including the framework it sets up through the planning instruments.

[131] The policies in the planning instruments ensure consistency of decision-making while allowing adaptation to meet changing circumstances through plans developed with public participation. It would be unaccountably wasteful of the effort in adopting such planning instruments and there would be a gap in the legislation if the planning instruments it enables and recognises are irrelevant to the exercise of the significant powers conferred on the Minister to alter the classification of protected conservation land and dispose of it, including by exchange. They enable the public participation provided for in the Act in actual decisions to be focused and consistent with the general policies adopted through a public process in a manner comparable to, although less developed than, the familiar hierarchy set up for resource management under the Resource Management Act 1991.[127]

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125 See above at [62].
126 See above at [109].
127 See for example *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[132] Section 17N(2) is inconsistent with the argument that the Minister is not required to observe the planning instruments adopted under the Act. The text of s 17N(2), as Ms Gepp for the Society pointed out, would be unnecessary if the Minister was not bound by s 17A. It provides that no statement, strategy or plan "shall restrict or affect the exercise of any legal right or power by any person other than the Minister or the Director-General or any Fish and Game Council". This provision assumes that the planning instruments will affect the exercise of the powers conferred on the Minister under the Act (although they may not "derogate" from it[128]). The instruments provide guidance for the exercise of discretions under the Act.[129]

[133] This view is consistent with the content of the statutory planning instruments themselves. As noted above, the Minister's foreword to the Conservation General Policy states that it will "guide, and in some cases direct, my decisions as Minister, and those of subsequent Ministers".[130] And the inclusion of chapter 6 relating to disposition of land in the Conservation General Policy would be pointless, as Ms Gepp submitted, if the Minister did not have to take into account the policies contained in it. Similarly, s 3.7 of the Hawke's Bay Conservation Management Strategy (concerning land administration) can only be directed to the powers exercised by the Minister who holds the conservation land.

[134] Finally, we do not accept the argument made on behalf of the Minister in this Court that ss 17T(2) and 17W(1) (requiring concessions to conform with management plans and strategies) are unnecessary if management plans and strategies must in any event be taken into account by the Minister in exercising powers under the Act and indicate that the Minister is not so bound when exercising powers under s 18.

[135] Conformation with management plans and strategies under Part 3A in relation to concessions applies only where the management plans and strategies

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128 See s 17B(2) in respect of statements of general policy and s 17D(4) in respect of conservation management strategies.

129 See *Rangitoto Island Bach Community Association Inc v Director-General of Conservation* [2006] NZRMA 376 (HC) at [40] per Harrison J.

130 See above at [54].

provide for the issue of concessions.[131] In general, concessions do not require public notification and are concerned with temporary use of land.[132] The specific reference to conformation with management strategies and plans makes it clear when they are to be taken into account, something that might otherwise have been unclear in relation to concessions, many of which are likely to have low conservation impact and apply to stewardship land. On the other hand, decisions as to change of protected status, acquisition of conservation land, and disposition of conservation land (including by exchange) are decisions which clearly impact upon wider plans and strategies for conservation. If able to be ignored in such decisions, the coherence and observance of the planning instruments would be seriously deficient. It is not surprising that the strategies and plans in issue in the present case dealt specifically with classification and disposition decisions. That accords with the sense of the legislation.

(b) Relevance of the planning instruments

[136] 4As has already been described, the Director-General in his decision adopted the report of the hearing convenor which took the view that, contrary to the submissions made by the Society, policy 6(b) of the Conservation General Policy was not relevant.[133] That view was taken on the basis that the revocation decision was not being undertaken because the conservation values in the 22 hectares of the conservation park land did not warrant protection (it was not suggested they did not), but in order to effect the exchange of land. The Society's reference to policy 6(b) was therefore considered to be a reference to "the wrong policy".

[137] The report similarly treated policies 6(c) and (d) as irrelevant since they related to "exchange", rather than "disposal". Section 3.7 of the Conservation Management Strategy was also thought by the Director-General not to apply to the revocation decision in the present case, where it is to achieve exchange of land. Section 3.7 was treated as applying only to "[the Department's] own review of its

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131 Section 17W(1).

132 The Minister must however give public notice of an intention to grant a lease or licence with a term (including all renewals) exceeding 10 years, and "may" do so in other circumstances if "having regard to the effects of the licence, permit, or easement, he or she considers it appropriate to give the notice": s 17T(4) and (5).

133 See above at [60].

land and any decisions it needs to make as a consequence about rationalising its holdings".

[138] The view that the planning instruments dealing with change of status and disposal of land were irrelevant turns on the same view that the revocation decision could be taken on the basis of the s 16A test. We consider that was wrong for the reasons already given above at [109]–[117]. It was necessary for the Director-General to consider whether the values of the resources in the conservation park continued to warrant the protection of that status. In that inquiry, indications in the statutory planning instruments that it was necessary for there to be focus on the intrinsic values of the land affected (as policy 6(b) requires) and that disposal was to be considered only where the Act permits it and where the land in question had "no, or very low, conservation values" or "low natural or historic value" (as policies 6(c)–(d) require and as s 3.7 of the Conservation Management Strategy echoes) were all highly relevant to the decisions being made by the Director-General. Policies 6(b)–(d) and s 3.7 were incorrectly treated as irrelevant because it was thought the only assessment required was whether there was enhancement of conservation values in the exchange, applying the s 16A test.

[139] Although in the submissions it was suggested that the policies in chapter 6 of the Conservation General Policy are distinct, they deal with different facets of change to public conservation lands. Policy 6(a) is concerned with "land acquisition or exchange (including boundary changes)". It guides additions to conservation lands so that natural resources and other conservation values can be managed "for conservation purposes" or "for the benefit and enjoyment of the public". Policy 6(b) is concerned with the classification of public conservation lands and the ability to review such classification from time to time to ensure that they continue to give appropriate protection and preservation for natural resources or other features or to provide access and enjoyment and integrated conservation management or to reflect the values of public conservation lands or to enable conservation outcomes to be obtained in the future. Policy 6(c) is concerned with land disposal. Disposal may be considered only if the legislation permits it and where "the land has no, or very low conservation values". In addition, under policy 6(d), disposal should not be undertaken if the land has international, national or regional significance, has

importance for the survival of any threatened indigenous species or under-represented habitats or ecosystems, is important for the functioning or amenity or utility or natural linkages between places, or secures practical walking access to public conservation lands and waters, rivers, lakes or the coast.

[140] These policies overlap. They impact on the decisions made in the present case. Policy 6(a) is of particular importance in identifying land for acquisition, including by exchange or boundary adjustment. In the present case it is relevant in assessing the conservation values advanced by acquiring the Smedley land for conservation purposes through exchange with stewardship land under s 16A.

[141] Policies 6(b)–(d), on the other hand, are concerned with the classification which determines what land is available to be considered for disposal, including by exchange. Indeed, in taking the view that only policy 6(a) was relevant to the decision being made, we consider that the Director-General looked only to the "benefit side of the exchange, the acquisition side and … [not] the loss side", as Ms Gepp submitted.

[142] The classification of land under policy 6(b) is critical to revocation. Contrary to the arguments put forward by the appellants, we are of the view that it applies whenever classification is reviewed from time to time, whether as part of an overall sorting of public conservation lands or in respect of the classification of particular conservation lands at any stage. There is no evident purpose in different approaches according to whether reclassification occurs on a one-off basis or as part of a general review. We are of the view that policy 6(b) was required by s 17A of the Conservation Act to be applied to the determination as to revocation of the classification of the 22 hectares of conservation park.

[143] The overall requirement in policy 6(b) is that classification must continue to give appropriate protection for the natural resources of any public conservation land. A revocation decision which does not directly address whether the existing classification continues to give appropriate protection for the natural resources represented in conservation park fails to observe the requirement in s 17A that all conservation areas and natural resources are to be administered and managed in

accordance with the statement of general policy approved by the Minister under s 17B.

[144] The hearing convenor took the view that s 16A (which provides in subs (7) that "[n]othing in section 26 or section 49 shall apply to the exchange of land under this section") "disapplies s 26 of the Act". The decision being taken by the Director-General was treated as one of "enhancement", in application of s 16A. We are unable to read s 16A(7) as legislative recognition that exchanges of stewardship land do not entail dispositions of land (making application of the policies concerning disposal irrelevant).[134] The scheme of the Act indicates that s 16A(7) is concerned to exempt from the requirements of public notification exchanges of stewardship land, a policy explained by the fact that the land is stewardship land and the exchange achieves enhancement for land administered by the Department. It does not suggest that there is no disposition in such exchange. It simply provides an exemption from the procedural requirements for public participation. Indeed, s 16A(7) would be unnecessary unless an exchange is understood in the legislation to be a disposition.

[145] Since a land exchange of conservation land necessarily entails disposal of the conservation land exchanged, policies 6(c) and (d) were policies that would have to be addressed when making a decision to exchange stewardship area under s 16A or otherwise disposing of it. On that basis the land would not be eligible for disposal, even if appropriately reclassified as stewardship land, unless it had "no, or very low, conservation values". The Society did not directly rely on policies 6(c) and (d) because its case was based on the lawfulness of the revocation decision and the failure to consider policy 6(b) in that connection. The principal relevance of policies 6(c) and (d) in the present case is therefore not whether the failure to take them into account itself amounted to error of law but that in the context they provide directions which constrain the power to revoke protected status under s 18(7). They are additional pointers to a statutory framework by which revocation of protected status turns on whether the intrinsic qualities of the protected land warrant prohibition against disposal (the material distinction between protected land and stewardship land). Since policy 6(c) prevents disposal of stewardship land unless it

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[134] The argument that exchanges do not involve dispositions of land was also advanced in relation to the marginal strip provisions in Part 4A. This is considered below at [150]–[161].

has "no, or very low, conservation values", it provides context for the revocation of protected status too.

[146] As the only basis put forward for revocation of conservation park status was to enable the exchange of the conservation park land by its disposal to the Company (implemented through s 16A(8) by the District Land Registrar), this framework suggests that revocation to enable disposal could reasonably be undertaken only if the land has "no, or very low, conservation values". The fact that the land has features acknowledged to have significance as habitats or ecosystems which are under-represented in public conservation lands also engages the policies against disposal contained in policy 6(d). They too underscore the inappropriateness of revocation of additional protected status in order to facilitate a disposition that is treated by the policy as inappropriate even for stewardship land.

[147] Similarly, we consider that on any review of the status of public conservation land within the Hawke's Bay Conservancy, s 3.7 of the Conservation Management Strategy applies.[135] Its relevance is not confined to the Department's "own review of its land". Section 3.7 in its own terms applies whenever the status of land is being reviewed. It requires consideration of protection of the resources in the land itself, rather than broader or more general conservation ends. Land with natural or historic values will be given "greater protection"; lands which have "low natural or historic value" may result in "disposals or exchanges". Again, this expresses a general policy of protection for land with natural conservation values and disposal or exchange only of land where the conservation values are "low". The purpose is to achieve "the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department". The status of areas under management of the Department depends on what is appropriate to protect their natural conservation values.

[148] Although the appellants contend that the policies in the planning instruments do not apply to the Minister, they also maintain that in any event the policies were complied with. We do not accept this conclusion is properly available on the evidence as to the decision set out at [14]–[31] above. Because the Department and

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[135] See above at [61].

Director-General proceeded on the basis that the s 16A test governed the transaction and were of the view that policies 6(b)–(d) and s 3.7 were irrelevant, they proceeded incorrectly on the basis that the only assessment required was whether there was overall enhancement of conservation values through the proposed exchange. Since the evidence makes it clear that there were significant conservation values associated with the 22 hectares, the error in approach was highly material to the Director-General's decision to revoke its protected status.

[149] The statutory planning instruments adopted under the Act could not be ignored by decision-makers when considering revocation of protected status for the purposes of effecting a disposition by exchange. To take into account only policy 6(a) is, as Ms Gepp rightly submitted, to consider only one half of the equation – the benefit from acquiring the Smedley land – without taking into account the detriment through the loss of the recognised significant conservation values of the 22 hectares. The scheme of the planning instruments is that an exchange of stewardship land under s 16A is appropriate only where the land has low conservation values. It is inimical to that scheme to revoke protected status to enable disposition by exchange on a net gain basis under s 16A where land has significant ecological, landscape and habitat values.

Marginal strips

[150] For the Minister it is said that there is "potential unfairness and prejudice to an applicant" who has agreed to an exchange if marginal strips are then reserved: "subsequent exclusion of marginal strips may impact the value of the negotiated agreement, or even entirely negate the objective of the exchange". It is not clear whether in the present case the concern is that, if marginal strips are reserved (as they are if the exchange is a "sale or other disposition of any land by the Crown"[136]), the Company will need a concession by way of easement for the use it intends or an exemption.[137]

[151] It may be noted that under Part 4A of the Act the Minister has power under s 24B to declare a disposition to be exempt from the marginal strip reservation under

[136] Conservation Act, s 24(1).
[137] See Part 3B and s 24B respectively.

s 24. But such declaration of exemption under s 24B can be made before disposition only if the Minister is satisfied "(a) that the land has little or no value in terms of the purposes [of marginal strips specified in s 24C] or (b) that any value the land has in those terms can be protected effectively by another means". There is an additional distinct power to grant an exemption in connection with "electricity works".[138] The powers of granting exemptions are subject to consultation with the relevant Conservation Board and Fish and Game Council and, if those bodies reasonably request it, public notification of the proposal.[139] Under s 24E the Minister may also authorise the exchange of any marginal strip "for another strip of land" if satisfied that the exchanges will "better achieve the purposes specified in section 24C". Any land obtained in such an exchange is itself deemed to be reserved as marginal strip.[140] These matters are not before the Court on the present appeal.

[152] The Minister and the Company argued in the High Court that an exchange would not constitute a "sale or other disposition" of land under s 24. Palmer J rejected the argument:[141]

> [89] I agree with [the Society] that what is currently proposed would constitute a disposition of land under s 24 of the Act. The Crown's and Company's argument that the exchange is not a sale or disposition is simply not tenable, based on text or purpose, especially given the wide definition of "sale" in s 2 of the Act and the breadth of the additional clarification provided by subs 24(6)-(9).

[153] In this Court, counsel for the Minister made the submission that, although the words of the provision suggest that an exchange may be a "disposition" of land, on a purposive approach the Act does not envisage exchanges under s 16A being subject to the marginal strip provisions in Part 4A. He argues that s 16A is best seen as a "stand-alone provision" requiring a comparative assessment of the conservation values of the parcels of land at issue, which necessarily includes the conservation values of any rivers and other water bodies on the land (which may or may not qualify for reservation under s 24(1)). In his submission this means that only the

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138 Section 24B(4)(b).
139 Section 24BA.
140 Section 24E(3).
141 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370.

s 16A test need be met, even if "the land holds all of the values that might be expected of a marginal strip".

[154] Counsel for the Company similarly submitted that the Minister's s 16A assessment would be "undermined by the more limited provisions controlling marginal strips" if Part 4A were to apply. He suggested there was a "circularity" in the Act if marginal strips were required to be reserved in s 16A exchanges, because s 24E then allows for exchanges of marginal strips for other land or for monetary compensation. He pointed also to textual considerations, such as the fact that s 24(2A) provides that "[w]here the Crown proposes to sell or otherwise dispose of any land, the responsible department of State or agency shall notify the Director-General of the proposal; and the sale or other disposition shall have no effect unless and until that requirement is complied with". Counsel invited the Court to infer that the Part 4A provisions cannot have been intended to apply to "transactions the Director-General and the Department are themselves engaging in", because it distinguishes between "the 'Director General' who needs to be informed of the proposed transaction, and the 'responsible department of State or agency' who is proposing it".

[155] More technical arguments were also advanced. It was submitted that s 16A(6), which provides that "[u]pon the transfer of any stewardship area or any part of any stewardship area under this section, that land shall cease to be subject to this Act", is an express exception for the purposes of s 24(8) of the Act, which states:

> Except as otherwise expressly provided, [s 24] shall apply to the disposition of any land by the Crown under the provisions of any enactment.

Associated with this was a "timing" argument, which was to the effect that because "[t]he mechanism for the creation of marginal strips is a sale or disposition against which it is recorded as being reserved to the Crown (rather than being formally excluded in the first instance)" a conflict with s 16A(6) would arise were marginal strips to be reserved (as land subject to the exchange decision is on transfer no longer subject to the Act).

[156] We do not find these arguments persuasive. First, an exchange of land necessarily entails its "disposition" as a matter of ordinary language. Such understanding is also supported by the existence of the authority under s 16A(8) which authorises District Land Registrars to make such entries and do anything else necessary to give effect to exchanges under s 16A. There is force also in the view expressed by Palmer J in the High Court that the wide definition of "sale" to include "every method of disposition for valuable consideration, including barter" is sufficient to constitute an exchange for other land as a "sale".[142] We therefore agree with the High Court that an exchange of the 22 hectares would entail its disposition, triggering the application of s 24.

[157] Nor do we accept the more sophisticated additional arguments advanced in this Court. Section 16A(6) is not an "express" exception, such as is envisaged by s 24(8). As the Society rightly submits, s 16A(6) "merely states the obvious: that when land is exchanged, the disposed land is no longer held under the Act". Nor do we find persuasive the argument that s 16A exchange (removing the land from the protection of the Act by virtue of s 16A(6)) occurs before the s 24 deeming provision can operate. The wording of s 24 is that marginal strips are "deemed to be reserved". Such deeming is simultaneous with the disposition itself. And the reservation of marginal strips is to be recorded on the title "upon the registration of any disposition by the Crown of any land",[143] again contemplating simultaneous effect. It is difficult to discern any policy in favour of the timing argument. It is consistent with the scheme and purpose of the Act that s 24 applies to exchanges under s 16A. Any effect on the relative values in the exchange arising out of the statutory reservation of marginal strips is something it may be expected will be taken into account in the terms of the exchange. It is difficult to see that any prejudice or unfairness would arise in practice.

[158] Nor do we accept that the existence of s 24E, concerning exchanges of marginal strips, creates a "loop" or "circularity" which suggests that exchanges of land are not dispositions for the purpose of Part 4A of the Act. An exchange of land

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142 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [89].

143 Conservation Act, s 24D(1).

which contains watercourses of more than three metres in width may not entail acquisition of equivalent marginal strips. Moreover, the assessment required by the tests for reduction, exemption and exchange under ss 24A, B and E is very different from the s 16A assessment. It is difficult to discern what legislative policy there could be in a blanket exemption of exchanges of land under s 16A from the reservation of marginal strips in s 24. The Minister has power to declare dispositions to be exempt from s 24 and may also exchange marginal strips under s 24E if the statutory criteria are met.

[159] There are in addition textual indications in the Act that exchanges of land are properly seen as "dispositions".[144] Section 16A does not itself describe exchanges of land as "dispositions". But s 16A(7) specifically exempts an exchange from the application of s 26 which relates to "[d]isposal of stewardship areas". That exemption is necessary only if an exchange is treated as a disposition. It is significant that no equivalent exemption is provided in connection with the reservation of marginal strips under s 24.

[160] Under s 24D of the Conservation Act the reservation of marginal strips from any disposition by the Crown of land under the Land Transfer Act 1952 must be recorded on the certificate of title for the land. An exchange of stewardship land under s 16A is effected by the District Land Registrar under s 16A(8). It is clear that such land is disposed of and that s 24D ensures that the reservation of marginal strips is recorded by the District Land Registrar. Section 24D(6) provides that any portion deemed to be reserved as marginal strip through the deemed reservation is excepted from the estate of the registered proprietor.

[161] The exchange in the present case has not yet taken place. The Company's acquisition of the land to be exchanged is still conditional. If there has been oversight in failing to take into account the reservation of the marginal strips required by the statute (and raised by the Society in its judicial review application as a failure to consider a relevant consideration in the s 16A determination) it may be that the terms of the exchange will be revisited. For present purposes it is sufficient

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[144] It is worth noting too that the drafter of the Department's general delegation instrument (referred to above at [12]) in defining the limits of delegation of the s 16A(1) power took the position that "an exchange involves a 'disposal'".

to affirm the decision of the High Court that an exchange under s 16A is a disposition which triggers the reservation of marginal strips adjoining streams of three metres or more in width in the absence of any exemption. It is acknowledged that the extent of the marginal strips so reserved will not be known until the land is surveyed. The consequences for the Ruataniwha Water Storage Scheme of the marginal strips created are not currently before us.

Conclusion

[162] The powers conferred by s 18 of the Conservation Act must be used for the purposes identified by the language and scheme of the primary legislation and consistently with any planning instruments adopted under it. Section 18(7) of the Conservation Act permits the Minister to revoke protected status of conservation land only where its intrinsic conservation values no longer warrant such protection. In the present case the Minister did not revoke the conservation park status of the 22 hectares because protected status for the land itself was not appropriate. It is clear that it was. The Court of Appeal was right to conclude that the revocation decision was unlawful because it was driven by the Director-General's view that there was net benefit to conservation ends to be obtained from the proposed exchange which could be implemented only if protected status was revoked. That did not justify revocation under s 18(7).

[163] The Director-General was also in error in failing to take into account the policies contained in the Conservation General Policy and in the Hawke's Bay Conservation Management Strategy adopted under the Conservation Act when making his determination to revoke protected status in order to effect the proposed exchange.

[164] Palmer J was correct to consider that an exchange of conservation land for other land entails a "disposition" of the conservation land and that, accordingly, an exchange under s 16A triggers the reservation of marginal strips adjoining streams of three metres or more in width in the absence of any exemption. The consequences of any such reservation are not currently before us and it is unnecessary to consider further the application of Part 4A.

[165] In accordance with the views of the majority, the appeals are dismissed. Costs are reserved. If an order for costs is sought, the parties may file written submissions within one month of the date of judgment.

WILLIAM YOUNG AND O'REGAN JJ
(Given by William Young J)

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Overview

[166] This case concerns four inter-related exercises of statutory power under the Conservation Act 1987 (the Act), being the decisions:

(a) declaring (under s 7(1)) the 22 hectares to be held for the purposes of a conservation park, taking it out of its transitional status under s 61;

(b) revoking (under s 18(7)) the conservation park status for the 22 hectares, meaning that the 22 hectares were then held as stewardship land ("the revocation decision");

(c) authorising (under s 16A(1)) the exchange of the 22 hectares for the Smedley land ("the exchange decision"), on the basis that the exchange would "enhance the conservation values of the land managed by the Department and promote the purposes of the Act"; and

(d) specifying (under s 16A(3)) that the Smedley land is to be held for the purpose of a conservation park, specifically the Ruahine Forest Park.

[167] The main focus of the case is on the revocation and exchange decisions, but particularly the former.

[168] The approach of the majority is based primarily on the conclusion that the power under s 18(7) of the Act to revoke the purpose for which land is held may not be exercised: (a) if the proposal to revoke is driven by a future exchange under s 16A; and (b) on the basis of a comparative assessment of conservation values of the land to be acquired with those of the land to disposed of. According to the majority, this is because: (a) a s 18(7) revocation decision can be justified only on the basis of a conclusion that the intrinsic merits of the land do not warrant its continuing status; and (b) the exercise as carried out conflated the s 16A and s 18(7) exercises. The majority judgment also proceeds on the basis that the decisions which are impugned are not consistent with the Conservation General Policy and the Hawke's Bay Conservation Management Strategy.

[169] We heard argument addressed to whether marginal strips of land would be required to be reserved. The Director-General of Conservation did not make a decision one way or the other on the reservation of marginal strips. In his judgment, Palmer J concluded that the exchange proposed would be a disposition of land for the purposes of s 24 of the Act and thereby rejected an argument advanced to him which, if accepted, would have meant that no marginal strips would be required.[145] He did not, however, conclude that marginal strips were required to be reserved.[146] Given the absence of a finding on this issue and, as well, in light of the majority

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145 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 (Palmer J) [*Forest and Bird* (HC)].

146 At [86]–[92].

decision which means that the issue is unlikely to require determination, we do not propose to engage with it in these reasons.

[170] Accordingly, we propose to deal with the case in terms of two questions:

(a) Was the s 18(7) decision made on the basis of irrelevant considerations?

(b) Was the s 18(7) decision inconsistent with the Conservation General Policy and Hawke's Bay Conservation Management Strategy?

Was the s 18(7) decision made on the basis of irrelevant considerations?

The purposes of the Conservation Act 1987

[171] The long title provides that the purpose of the Act is to:

> promote the *conservation* of New Zealand's *natural* and historic *resources*, and for that purpose to establish a Department of Conservation
>
> (emphasis added)

[172] Section 2 relevantly provides:

> **conservation** means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations
>
> …
>
> **preservation**, in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values
>
> …
>
> **protection**, in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—
>
> (a) its restoration to some former state; and
>
> (b) its augmentation, enhancement, or expansion

[173] Section 6 provides for the functions of the Department of Conservation. It relevantly provides:

> **6 Functions of Department**
>
> The functions of the Department are to administer this Act and the enactments specified in Schedule 1, 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:
>
> …
>
> (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
>
> …
>
> (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:

The status of the 22 hectares as a conservation park

[174] Immediately prior to the Act coming into effect, the 22 hectares in question formed part of the Ruahine Forest Park. They were accordingly deemed by s 61(2) to be a conservation park, a deemed status which was to persist until either there was a declaration under s 7(1) that the land be held for conservation purposes or the land was vested in a State enterprise under s 24 of the State-Owned Enterprises Act 1986.[147]

[175] Section 7 provides for declarations that land is held for conservation purposes. Land subject to such a declaration constitutes a "conservation area" as defined by s 2. Sections 18, 18AA and 18AB provide for "additional protection or preservation requirements" to be provided by declarations that particular

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147 Conservation Act 1987, s 61(2)(c) and (d).

conservation areas are to be held for particular purposes. Most relevantly for present purposes, this includes (by virtue of s 18(1)) "the purpose of a conservation park".

[176] Section 19(1) provides:

> **19 Conservation parks**
>
> (1) Every conservation park shall so be managed—
>
> (a) that its natural and historic resources are protected; and
>
> (b) subject to paragraph (a), to facilitate public recreation and enjoyment.

Stewardship areas

[177] Stewardship areas are defined in this way:[148]

> ***stewardship area*** means a conservation area that is not—
>
> (a) a marginal strip; or
>
> (b) a watercourse area; or
>
> (c) land held under this Act for 1 or more of the purposes described in section 18(1); or
>
> (d) land in respect of which an interest is held under this Act for 1 or more of the purposes described in section 18(1)

[178] Section 25 provides:

> Every stewardship area shall so be managed that its natural and historic resources are protected.

Disposal of conservation areas

[179] Disposal of conservation areas is addressed in ss 16, 16A and 26. The starting point is that there can be no disposal unless specifically authorised. This is provided for by s 16(1):

> **16 Disposal of conservation areas**
>
> (1) Notwithstanding anything in the State-Owned Enterprises Act 1986 but subject to the Public Works Act 1981, no conservation area or

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148 Section 2.

interest in a conservation area shall be disposed of except in accordance with this Act.

[180] The Act provides two mechanisms for the disposal of stewardship areas: disposal under s 26 and exchange under s 16A.

[181] Section 26 relevantly provides:

> **26 Disposal of stewardship areas**
>
> (1) Subject to subsections (2) and (3), the Minister may dispose of any stewardship area that is not foreshore or any interest in any stewardship area that is not foreshore.
>
> (2) The Minister shall not dispose of any land or any interest in any land adjacent to—
>
> (a) any conservation area that is not a stewardship area; or
>
> (b) land administered by the Department under some enactment other than this Act,—
>
> unless satisfied that its retention and continued management as a stewardship area would not materially enhance the conservation or recreational values of the adjacent conservation area or land or, in the case of any marginal strip, of the adjacent water, or public access to it.
>
> (3) The Minister shall not dispose of any land or any interest in land without first giving notice of intention to do so; and section 49 shall apply accordingly.

[182] Section 49 provides for a process under which publication of what is proposed is required. Members of the public and organisations may object and be heard in respect of the proposal.[149]

[183] The other, and for present purposes more significant, mechanism is under s 16A:

> **16A Exchanges of stewardship areas**
>
> (1) Subject to subsections (2) and (3), the Minister may, by notice in the *Gazette*, authorise the exchange of any stewardship area or any part of any stewardship area for any other land.

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149 Section 49(2).

> (2) The Minister shall not authorise any such exchange unless the Minister is satisfied, after consultation with the local Conservation Board, that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of this Act.
>
> (3) All land acquired by the Crown under this section shall be held for such conservation purposes as the Minister may specify in respect of that land by notice in the *Gazette*.

[184] Section 16A was inserted by the Conservation Law Reform Act 1990, s 11. While in Bill form, the clause would have allowed the Minister to authorise "the exchange of any conservation area or any part of any conservation area for any other land".[150] Presumably as a response to submissions opposing the breadth of this power, the Bill was amended so that the exchange power was confined to stewardship land.

The power to revoke a purpose for which land is held

[185] This is pursuant to s 18(7) and (8):

> (7) Subject to subsection (8), the Minister may, by notice in the *Gazette*, vary or revoke the purpose, or all or any of the purposes, for which any land or interest held under subsection (1) is held; and it shall thereafter be held accordingly.
>
> (8) Before varying or revoking any purpose under subsection (7), the Minister shall give public notice of intention to do so; and section 49 shall apply accordingly.

[186] The effect of such a revocation is that the land affected becomes a stewardship area.

The basis on which the revocation decision was made

[187] In his affidavit in the High Court, the Director-General of Conservation explained the rationale of his decision in this way:

> I assessed the scientific information, including the additional information values on a before and after the dam scenario. I considered the information, which covered not only the [22 hectares] but also the Smedley land to be thorough, reliable and objective and the peer reviews of it assisted in this. There was no doubt in my mind that what was being proposed would

[150] Conservation Law Reform Bill 1989 (182–1), cl 11.

> enhance the conservation values of land managed by the Department and promote the purposes of the Act. Based on the present values of the [22 hectares] and the Smedley block, I was satisfied that the exchange would enhance the conservation values of the Ruahine Forest park as a whole and the broader conservation estate.

[188] Three factors were thus identified:

(a) enhancement of the conservation values of the land managed by the Department;

(b) promotion of the purposes of the Act; and

(c) enhancement of the conservation values of the Ruahine Forest Park as a whole.

The approach of Palmer J in the High Court

[189] The Judge accepted that the revocation and exchange decisions required separate consideration:

> [68] … I agree with [the Society] that there are two distinct decisions required where a specially protected conservation area such as a conservation park is proposed to be exchanged for other land. That is reinforced by the scheme and purpose of the legislation. First, the decision-maker must decide whether to revoke the specially protected purpose of the conservation area. Only if the outcome of that decision is revocation may the decision-maker then decide whether to undertake the land exchange. To view the process as a single step would be to obviate the clear Parliamentary intent not to provide a mechanism allowing specially protected land to be the subject of exchange.

He went on to conclude that although the Director-General had come "perilously close" to deciding the revocation decision by reference to the s 16A criteria,[151] he had not done so:

> [78] … As noted above, the Director-General's evidence is that "[t]here was no doubt in my mind that what was being proposed would enhance the conservation values of land managed by the Department and promote the purposes of the Act". He was "satisfied that the exchange would enhance the conservation values of the Ruahine Forest park as a whole and the broader conservation estate". Conceivably, those two statements could be taken to refer only to the narrower test for s 16A.

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[151] At [75].

> [79] However, the Director-General's evidence also directly addressed the objection raised by [the Society] in submissions that is the subject of this challenge. To that, the Director-General says "[i]n response to the above approach, I took the view that the powers in the Act existed and focussed on whether the purpose of the Act was being advanced". I am not satisfied, on the evidence, that the Director-General took too narrow a view of the revocation decision by applying to it the test for exchange. He relied on his staff's broader assessment of the conservation values of the Smedley block, including future values, rather than the current values urged on [Department of Conservation] by the Company. And in his evidence he goes beyond the s 16A test and the land managed by [Department of Conservation] to say "[t]hat said, I am convinced that what was offered to and accepted by me well and truly meets the purpose of the Conservation Act is a good outcome for the Department and conservation".
>
> (footnotes omitted)

[190] Pausing at this point, and contrary to the view of the Judge, we are inclined to see the enhancement of the Ruahine Forest Park as a factor relevant to revocation which, in terms of its specificity, can most plausibly be seen as going beyond the comparative assessment exercise contemplated by s 16A.

The approaches proposed in the Court of Appeal

[191] The general approach of Harrison and Winkelmann JJ is captured in this passage of their reasons:[152]

> [70] When deciding to exercise his or her statutory discretion to revoke the status of a specially protected area under s 18(7) the Director-General is required to ask whether land which has satisfied the statutory criteria for special protection is no longer required for conservation purposes; that is, its intrinsic values no longer justify preservation and protection. Account must be taken of the purpose of the special protection — to *permanently* maintain its intrinsic values, provide for its appreciation and recreational enjoyment by the public, and safeguard the options of future generations — as well as the emphasis on *recreation* which distinguishes conservation parks from other specially protected areas. To be clear, the permanence of protection is not absolute: it depends on the land concerned maintaining the values for which it was designated.
>
> [71] A proposal to exchange specially protected land will only be relevant to the s 18(7) inquiry if the Director-General is first satisfied that the specially protected area no longer merits its particular designation — in this case, a conservation park held for park purposes — and should be reclassified as a stewardship area. The Act does not allow the Director-General to exercise his or her revocation power by the touchstone

[152] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 (Ellen France P, Harrison and Winkelmann JJ) [*Forest and Bird* (CA)].

> of whether a decision will enhance the conservation values broadly construed of land managed by the Department. While that inquiry is appropriate to an exchange decision under s 16A(1), it is inapplicable where the revocation proposed is of a specially protected designation.

[192] They were also of the view that the Director-General had conflated the revocation and exchange decisions:

> [74] Contrary to the Judge's conclusion, we are satisfied that the Director-General was driven by the s 16A test. As Mr Prebble accepted, the Director-General was undertaking a comparative analysis of land that enjoyed special protection with land that did not. The Director-General acknowledged throughout that he would not have revoked the status of the 22 hectares but for the exchange proposal. There is no difference, as Mr Salmon observed, between the Director-General making the revocation decision to enable the exchange and applying the test for exchange to the revocation decision. Whichever way it is viewed, the conflation of the revocation and exchange inquiries had the effect of circumventing a statutory prohibition which had been the subject of careful legislative consideration before its enactment.

[193] Ellen France P dissented in the Court of Appeal, being generally in agreement with Palmer J. In the course of her reasons, she considered that it was:

> [94] … of some relevance that the difference in the identified values is in the additional requirement that conservation parks are to be managed in a way that facilitates public recreation and enjoyment. In this case, there is force in the submission that the factors that primarily justify maintaining the conservation park status over and above stewardship, that is, public recreation and enjoyment, were not present in relation to the 22 hectares because of difficulties with access. But the [Ruahine Forest Park] as a whole would be enhanced in terms of public recreation and enjoyment by the addition of the Smedley Block, which would not involve difficulties in terms of access.

Our approach

[194] Section 16A(2) stipulates that an exchange may be approved only if it: (a) would "enhance the conservation values of land managed by the Department"; and (b) promotes the purposes of the Act. Given the statutory language, the departmental assessments of comparative conservation values understandably focused on whether the conservation values of the land managed by the Department would be enhanced by the exchange of the 22 hectares for the Smedley land. Such a comparative exercise was required by s 16A and cannot, in itself, be open to

criticism. Indeed, the conclusion reached in respect of this assessment was not the subject of discrete challenge.

[195] In the course of argument, Mr Salmon, for the Society, denied that the exchange resulted in a net overall conservation gain. This argument was put in various ways: for instance, that the conservation values of the Smedley block were not under immediate threat and some protection was provided by the Resource Management Act 1991. As well, the land being for sale, it could presumably have been acquired by purchase and not just by exchange.

[196] This argument raises some difficulty. The departmental assessments do not explicitly proceed on the basis of a net overall conservation gain, although possibly the assumption that there would be such a gain is implicit in some of the material. Mr Salmon's argument as just summarised is not mentioned in the judgment of Palmer J in the High Court and the affidavits filed on behalf of the Society do not appear to have been addressed to it. Had it been addressed in those affidavits, it may well have been answered by additional evidence. Accordingly we think it appropriate to put this aspect of Mr Salmon's submission to one side.

[197] As this Court observed in *Unison Networks Ltd v Commerce Commission*:[153]

> A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". A power granted for a particular purpose must be used for that purpose … .

[198] The majority's approach is to construe s 18(7) as if it contained the italicised additions:

> Subject to subsection (8), the Minister, *if satisfied that the intrinsic conservation merits of the land no longer warrant being held as a conservation park, ecological area, or for any other purpose specified under s 18(1)* may, by notice in the *Gazette*, vary or revoke the purpose, or all or any of the purposes, for which any land or interest held under subsection (1) is held; and it shall thereafter be held accordingly.

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[153] *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53] (footnotes omitted).

[199] No hint of such a limitation is to be found in the language of s 18(7). Nor is there any other specific provision in the Act which explicitly suggests this limitation. The effect of the majority approach is to impose a restriction which is substantially the same as that provided by s 24(3) of the Reserves Act 1977:

> No change of classification or purpose of a scenic, nature, or scientific reserve, or any part thereof, to a recreation, historic, government purpose, or local purpose reserve shall be made, except where, in the opinion of the Minister, the reserve or the part thereof is by reason of the destruction of the forest, bush, or other vegetation, or of the fauna or scientific or natural features thereon, or for any other like cause, no longer suitable for the purposes of its classification.

If the legislative purpose had been that s 18(7) should be constrained in the way proposed by the majority, we would have expected a provision similar to s 24(3) of the Reserves Act to have been enacted.

[200] The limitation proposed by the majority might also be thought to sit oddly with s 61(2) of the Conservation Act and s 24 of the State-Owned Enterprises Act under which the 22 hectares could simply have been vested in a State enterprise.

[201] The key differences between conservation park and stewardship land are that stewardship land, but not conservation park, can be exchanged (or otherwise disposed of) and the facilitation of recreational use and enjoyment is provided for in respect of conservation park, but not stewardship land.[154] Where a decision is required whether land should be held as a conservation park or stewardship land, it might be thought obvious that the decision-maker should approach the issue by reference to those differences in determining which is the better classification. And in doing so, the decision-maker must take into account the purposes of the Act.

[202] We accept that the statutory history of s 16A provides some assistance to the Society's argument. The narrowing of s 16A (so that it applies only to stewardship land) from what was proposed (the exchangeability of all land held for conservation purposes) could be side-stepped if a conservation park declaration could be set-aside by reference only to the criteria which must be satisfied for a subsequent s 16A

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[154] We note that the majority (above at [41]) see exchangeability as the primary difference between conservation park and stewardship land.

exchange of the land. It follows that there is certainly scope for argument that a s 18(7) revocation cannot be justified simply on the basis that, assuming revocation, the land would be properly exchangeable under s 16A.

[203] Accepting, as we do, the force of this argument, we do not see it as precluding a revocation decision being made by reference to the appropriateness of the proposed exchange. In part this is for the reason already given, that one of the key distinctions between conservation park land and stewardship land is the exchangeability of the latter. As well, the purposes of the Act are required to be taken into account in respect of the exchange decision (explicitly by reason of s 16A(2) and by obvious implication in respect of s 18(7)). There being only one set of purposes, there will necessarily be substantial overlap in the criteria to be taken into account in both decisions.

[204] In the present case, the decision to revoke the declaration did not rest simply on an abstract comparison of the conservation values of the 22 hectares and the Smedley block. Eight hectares of the 22 hectares was separated from the rest of the Ruahine Forest Park. The Smedley block is adjacent to the Gwavas Conservation Area which is near the Ruahine Forest Park and bringing it under the control of the Department offers some management and recreational advantages.

Was the s 18(7) decision inconsistent with the Conservation General Policy and Conservation Management Strategy?

The statutory setting

[205] Under s 17A of the Act "the Department" is to "administer and manage" conservation areas "in accordance with" both "statements of general policy" and "conservation management strategies".[155]

[206] Section 17N(2) provides:

> No such statement or strategy or plan shall restrict or affect the exercise of any legal right or power by any person other than the Minister or the Director-General … .

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[155] As well as (irrelevant for our purposes) conservation management plans and freshwater fisheries management plans.

The Conservation General Policy

[207] Policy 6(a) of the Conservation General Policy (CGP) provides:

> 6(a) Land acquisition or exchange (including boundary changes) may be undertaken to manage, for conservation purposes, natural resources or historical and cultural heritage; or for the benefit and enjoyment of the public, including public access, where the land has international, national or regional significance; or where land acquisition or exchange will either:
>
> i. improve representativeness of public conservation land; or
>
> ii. improve the natural functioning or integrity of places; or
>
> iii. improve the amenity or utility of places; or
>
> iv. prevent significant loss of natural resources or historical and cultural heritage; or
>
> v. improve the natural linkages between places; or
>
> vi. secure practical walking access to public conservation lands and waters, rivers, lakes or the coast; or
>
> vii. achieve any other purpose allowed for under the relevant Acts.

It was this policy which was focused on in the decision-making process.

[208] The Society relies on policy 6(b) of the same document:

> 6(b) Subject to statutory requirements, the classification of any public conservation lands may be reviewed from time to time to ensure that the classification of such lands continues to either:
>
> i. give appropriate protection and preservation for their natural resources, and/or historical and cultural heritage; or
>
> ii. give appropriate protection and preservation for their educational, scientific, community, or other special features, for the benefit of the public; or
>
> iii. enable integrated conservation management identified in conservation management strategies or plans; or
>
> iv. provide for access and enjoyment by the public where that is in accordance with the purposes for which the land is held; or
>
> v. reflect the values of public conservation lands that are present; or

vi. enable specified places to achieve conservation outcomes in the future.

[209] The majority judgment also refers to policies 6(c) and (d).[156] We see these as addressing land disposal (that is, under s 26) and as not material to land exchange decisions under s 16A. They were not relied on by the Society and we do not propose to discuss them further in these reasons.

The Hawke's Bay Conservation Management Strategy

[210] The Society relies on section 3.7(ii) of the Hawke's Bay Conservation Management Strategy (CMS):

> The Department will review the status of areas under its management and proceed to appropriately alter them if necessary. This may result in a change of status to give greater protection to natural or historic values or it may result in disposals or exchanges of land which have low natural or historic value.

The objective of chapter 3.7 is expressed in these terms:

> To achieve the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department.

The decision-making process

[211] In the decision-making process, policy 6(b) of the CGP was seen as directed at situations where the Department proactively reviews the classification of land intended to be retained with a view to ensuring the classification "continues" to achieve one or more specified outcomes. And chapter 3.7 of the CMS, especially its objective and section 3.7(ii), was likewise seen as directed to the proactive and periodic general review of land under departmental management. Both documents were seen as setting out processes which are intended to occur and neither purport to limit the ability the Department and/or Minister to exercise statutory powers in circumstances, such as the present, which they do not address.

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[156] See above at [58]–[59]; and especially at [145]–[146].

The approaches taken in the Courts below

[212] Arguments addressed to the CGP and the CMS were dismissed by Palmer J:[157]

> [83] The problem with this argument is that the particular policies that [the Society] point to are not policies which govern the decision under challenge. The decision under challenge is to revoke the specially protected status of the Forest Park land under s 18(7) of the Act. Policy 6(b) of the Conservation General Policy provides [the Department of Conservation] with a discretion to conduct a general review, from time to time, of the classification of public conservation lands and of the status of areas under DoC's management. Section 3.7 of the Hawke's Bay CMS, entitled "Land Administration", relates to the need for [the Department of Conservation] to conduct a review of the status of land "as the existing status may not necessarily reflect their natural values". The objective is stated to be [t]o achieve the most appropriate statutory and administrative framework for the protection of natural or historic values on lands managed by the Department.
>
> [84] The nature and purpose of the general review exercises which are guided by these policies are quite different from the specific decision about the proposed revocation of the existing status of the Forest Park land here. As the Crown submits, policy 6(a) of the Conservation General Policy applies, and links the consideration of land exchange back to conservation purposes as required by the Act … .

[213] Given their approach on the other issues in the case the majority in the Court of Appeal was not required to address this issue.[158]

Our approach

[214] On this aspect of the case, we agree with Palmer J. The policies in the CGP and CMS are expressed in general terms and provide a framework for review processes which are intended to take place in the ordinary course of the Department's administration of the Act. They do not apply to consideration of specific one-off proposals.

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157 *Forest and Bird* (HC), above n 145.
158 *Forest and Bird* (CA), above n 152, at [81].

[215] Accordingly, we would have allowed the appeal.

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