IN THE COURT OF APPEAL OF NEW ZEALAND

CA118/2016
[2016] NZCA 411

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

Hearing:	27 May 2016
Court:	Ellen France P, Harrison and Winkelmann JJ
Counsel:	D M Salmon and S R Gepp for Appellant J M Prebble and J E Dick for First Respondent FMR Cooke QC, MJE Williams and T P Robinson for Second Respondent
Judgment:	31 August 2016 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is dismissed.

C The decision of the Director-General of Conservation made on 5 October 2015 to revoke the special protection designation of a defined part of the Ruahine Forest Park is set aside, with a direction that he reconsiders the application made by the second respondent to exchange that land with the Smedley Block in accordance with the terms of this judgment.

D There will be no order as to costs.

REASONS

HARRISON AND WINKELMANN JJ
(Given by Harrison J)

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Introduction

[1] The Conservation Act 1987 (the Act) is a milestone in New Zealand's legislative history, marking a distinct shift in society's attitude away from a "pioneer mentality" which treated our natural resources as being of infinite availability. In reflecting a clear consensus arising from a comprehensive process of consultation, Parliament introduced a novel regime for the purposes of preserving

and protecting vital areas of the country's landscape and providing for the voice of conservation to be heard as part of a balanced system of administration. A central feature of the Act was that it entrusted to the Department of Conservation (the Department) the duty to act as kaitiaki or guardian of certain resources including land of such high conservation value as to justify designation as an area of special protection, not just for the present but for the needs and aspirations of future generations.

[2] This commentary can be traced to the speech of the Honourable Russell Marshall, then the Minister of Conservation, at the introduction of the Conservation Bill 1986 (the Bill) to Parliament on 11 December 1986.[1] Nearly 30 years later, the present appeal brings into focus an issue going to the heart of the Act: on what legal basis should the Director-General of the Department exercise his or her statutory discretion to revoke a special protection designation for a defined area of conservation land?

Factual background

[3] Hawke's Bay Regional Investment Company Ltd (HBRIC) has been formed by the Hawke's Bay Regional Council to implement what is known as the Ruataniwha Water Storage Scheme. The company has secured the necessary statutory consents to capture and store about 90 million cubic metres of water within a dam to be constructed across the Makaroro River, allowing the irrigation of 25,000 to 30,000 hectares of land on the Ruataniwha Plains.

[4] However, creation of the water storage reservoir behind the dam will require the flooding of a large area of land, including 22 hectares within the 94,000-hectare Ruahine Forest Park (the RFP). The RFP is a conservation park subject to the Act, which the Department is charged with managing according to park purposes under the relevant regime. As a conservation park, the RFP including the 22 hectares is subject to a statutory prohibition against disposal or exchange. The same prohibition does not apply to land separately designated as a stewardship area.

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1 (11 December 1986) 476 NZPD 6138–6140.

[5] In order to resolve this difficulty, HBRIC made a proposal to the Department to exchange the 22 hectares for a block of 170 hectares of land known as the Smedley Block, part of a larger area which is statutorily administered for farming purposes and is contiguous to the RFP. HBRIC has agreed to purchase the Smedley Block, conditional upon the Department's approval of its exchange proposal.

[6] The Director-General decided to accept HBRIC's proposal following a formal public hearing and inquiry. He made three separate but interrelated decisions for this purpose: first, declaring the 22 hectares to be held for conservation purposes (the declaration); second, revoking the conservation park purpose of the 22 hectares and substituting its designation as a stewardship area (the revocation decision); and, third, exchanging the 22 hectares for the Smedley Block (the exchange decision).[2]

[7] The Royal Forest and Bird Protection Society of New Zealand Inc (the Society) challenges the lawfulness of the revocation decision. It says that a decision to revoke must be related solely to an assessment of the land's intrinsic values, not by reference to whether it will result in a net gain to the conservation estate; and that this decision was made for the sole purpose of downgrading the designation of the 22 hectares from a specially protected conservation park to a stewardship area, thereby freeing it to be traded. Also it says the decision was not made in accordance with relevant statutory policies, and the Director-General failed to reserve what are known as marginal strips when making the exchange decision. It is common ground that the exchange decision stands or falls on whether the revocation decision is lawful.

[8] Palmer J dismissed the Society's application to the High Court for judicial review of the revocation decision, finding that the Director-General acted lawfully by satisfying himself that the decision was properly based on conservation purposes interpreted broadly.[3] The Society appeals. The Director-General and HBRIC cross-appeal against the Judge's refusal to determine the legal status of the reservation of marginal strips.

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2 The Director-General's decision is set out verbatim at [41] of this judgment.

3 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Minister of Conservation* [2016] NZHC 220 [HC decision].

[9] We must address the Society's appeal within the framework of the relevant statutory provisions and history. Also, to assist in understanding the issue, we have annexed to the end of this judgment the Department's *Ruahine Forest Park Land Revocation and Exchange Map*, which depicts in particular the 22 hectares and the Smedley Block in relation to the Makaroro River and the RFP.

Legislative framework

(1) Background

[10] The Act was passed as part of a series of measures designed to reorganise the ownership and management regimes for Crown land. That land was allocated to various state agencies for management purposes. It was intended that the Department would administer about six and a half million hectares.[4]

[11] Both principal parties devoted attention to the relevant legislative history. Amelia Geary, a manager employed by the Society, narrated informative background to the Act. She referred particularly to a report published by the Parliamentary Commissioner for the Environment three years ago explaining the reasons behind creating the discrete land designations.[5] Indeed, when introducing the Bill to the House, the then Minister of Conservation summarised how the designations and related management regimes were to be tailored:[6]

> [The Bill] describes the overall estate as made up of conservation areas, and creates two discrete management categories within those areas. Much of the land in question is to be described as a stewardship area—that is, land for which no end use has been decided. The Bill provides a mechanism by which land will be held and managed under stewardship practices and principles. That category of land is to be held and managed by the [Department] so that its inherent characteristics remain unaltered. It is not a category that rules out farming or other activities. When it can be shown that any of the land should be used permanently for commercial purposes, provision is made in the Bill for its disposal. *Similarly, if some land is of such high value that it needs to be formally protected, the Bill provides the means for giving it that protection.* Both the process of disposal for commercial use and that of upgrading for protection are subject to public notification. …

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4 At [6].

5 Parliamentary Commissioner for the Environment *Investigating the future of conservation: The case of stewardship land* (August 2013). The three designations of conservation area are described in detail from [17] of this judgment.

6 (11 December 1986) 476 NZPD 6139.

> The second category of land provided for in the Bill is for those areas that are to be protected. Those consist of land given under the Forests Act [1949], including … conservation parks. Those categories of protected areas are carried forward into the Bill, which provides for management regimes appropriate to the present designations.
>
> Two new categories have been provided for—wild and scenic water course management areas, and marginal strips, both providing for the protection of natural values, and for public access to rivers and streams …
>
> (Emphasis added.)

[12] As counsel agreed before us, the stewardship designation was devised as a holding category for land which, although there may have been no specific proposal for its protection when the Act was passed, could be given a designation and interim protection until a more appropriate use arose. The apparent statutory intention was that the Department would progressively assess the conservation value of different areas of stewardship land. As the Parliamentary Commissioner reported, each area would then be reclassified into the appropriate category of conservation land if it had conservation values but would be disposed of if it had little or no such value.[7]

[13] The Department is to act as the steward until the fate of land in this holding category is decided. Once a stewardship area is reclassified as specially protected, it is no longer vulnerable to the risk of disposal or exchange and is properly managed in terms of the Act's requirements. While the elevation to special protection implies satisfaction of a generic threshold of conservation value, it is axiomatic that the qualities of the land concerned must guide the assessment of its particular designation and management regime. We turn now to the mechanics of the Act.

(2) General provisions

[14] The long title to the Act describes its purpose as:

> To promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation.

[15] The interpretation provision, s 2(1), defines a number of words and phrases relevantly as follows:

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[7] Parliamentary Commissioner for the Environment, above n 5, at 5.

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

conservation area means any land or foreshore that is—

(a) land or foreshore for the time being held under this Act for *conservation purposes*; …

…

natural resources means—

(a) plants and animals of all kinds; and

(b) the air, water, and soil in or on which any plant or animal lives or may live; and

(c) landscape and landform; and

(d) geological features; and

(e) systems of interacting living organisms, and their environment—

and includes any interest in a natural resource

…

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

…

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)

(Emphasis added.)

Section 2(2) states:

> In this Act, unless the context otherwise requires, **conservation park**, **ecological area**, **sanctuary area**, or **wilderness area**, mean an area held for ecological, park, sanctuary, or wilderness purposes under section 18AA(1) or 18(1).

[16] Part 2 established the Department, describing in s 6 its functions as being among other things:

> (a) to manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under [the] Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department …

(3) Conservation areas

[17] Part 3 provides a regime for acquiring, holding and managing conservation areas. By s 7(1) the Minister may declare that any land for which the Department is responsible "is held for conservation purposes; and, subject to this Act, it shall thereafter be so held". Conservation areas include all land held for conservation purposes: specially protected areas, marginal strips and stewardship areas. Parts 4, 4A and 5 provide for the management of these discrete designations. But all three are governed according to the underlying principles provided by the statutory meaning of conservation: 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.

[18] Under pt 3, s 16(1) prohibits the Minister from disposing of any "conservation area or interest in a conservation area … except in accordance with [the] Act". However, the Minister is empowered by s 16A to "authorise the exchange of any stewardship area … for any other land" but not unless he or she "is satisfied … that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of [the] Act".

(a) Specially protected areas

[19] The first designation of specially protected areas is governed by pt 4. Section 18 materially provides:

> **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.
>
> …
>
> (4) Where any land or interest is declared to be held for the purpose of an ecological area under subsection (1), the notice concerned shall specify the particular scientific value for which it is held.
>
> (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).
>
> (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.

[20] The purpose and effect of s 18 is central to our determination of the Society's appeal. Section 18(1) allows the Director-General, under delegation from the Minister of Conservation, to declare any land managed by the Department to be held for specific conservation purposes, which brings a conservation area into one of the management regimes for specially protected areas under ss 19 to 23B: conservation parks, wilderness areas, ecological areas, sanctuary areas, watercourse areas, amenity areas, and wildlife management areas. Following such a declaration, the land "shall thereafter so be held" according to the declared purposes and subject to the Act. The RFP, as a conservation park, is managed in accordance with s 19(1):

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

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

[21] Section 18(7) provides the discretionary power to revoke or vary a special designation of land held for conservation purposes. Before invoking this power, the Minister is obliged by s 18(8) to give public notice of his or her intention to do so. In that event, s 49 applies. Members of the public are entitled to object in writing to the Director-General. An objector shall be given "a reasonable opportunity of appearing" in support of an objection before the Director-General formally recommends to the Minister whether the objection should be allowed or accepted. The Minister must then consider the recommendation before deciding whether to proceed with the revocation proposal. That procedure was adopted in this case.

(b) Marginal strips

[22] The second relevant designation is marginal strips. Section 24 provides that:

(1) There should be deemed 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—

…

(c) the bed of any river or any stream …

[23] These provisions are material:

(a) By s 24A(2) the Minister has the power, where the bed of the river or stream is not less than three metres in width and the land (including the marginal strip) contains not more than two hectares, to approve the reduction of the strip to not less than three metres if satisfied "that its value in terms of the purposes specified in section 24C will not be diminished".

(b) By s 24C, all marginal strips under the Act are held for conservation purposes, including the maintenance of water quality and aquatic life and the protection of the marginal strips and their natural values; to

enable public access to any adjacent watercourses; and for public recreational use of the marginal strips and the adjacent watercourses.

(c) By s 24E the Minister may authorise the exchange of any marginal strip for another strip of land but not unless satisfied that the exchange will better achieve the purposes specified in s 24C.

(c) Stewardship areas

[24] The third relevant designation is stewardship areas. Section 25 provides for their management so that their "natural and historic resources are protected". Section 2(1) defines a stewardship area as a conservation area that is not a marginal strip which is not held for a special purpose under s 18(1). Thus, it comprises all land held for conservation purposes that does not fall into the first two categories of specially protected areas and marginal strips.

[25] The key point of distinction from other conservation areas, as noted earlier, is that s 16A authorises the Minister to exchange stewardship area for other land if satisfied that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act. Further, s 26 states that the Minister is prohibited from disposing of any stewardship area:

> … 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 …

[26] When disposing of a stewardship area, the Minister must give public notice of his or her intention to do so and s 49 applies accordingly.

(4) Transitional provisions

[27] The RFP was originally subject to the Forests Act 1949. Its status as a State forest park was established by a Gazette notice published in 1976 and it was brought within the Act's jurisdiction by the transitional provisions found in pt 8. By virtue of s 61(2) within pt 8, any land which immediately before the Act's commencement was a forest park is deemed to be a conservation park and held for park purposes under s 2(2), and held for those conservation purposes under s 61(9),

until it is either declared to be held for conservation purposes under s 7(1) or vested in a State enterprise under s 24 of the State-Owned Enterprises Act 1986. Pending those contingencies, s 61(9) provides that "neither [the conservation park] nor any interest in it shall be disposed of except by vesting as aforesaid".

[28] A declaration that land is to be held for conservation purposes without further specification would ordinarily result in a stewardship designation. However, s 61(3) materially provides:

> 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).

Thus, a former forest park governed by s 61(2) that is ultimately declared to be held for conservation purposes is deemed to have been specially declared to be held for the purpose of a conservation park rather than as a stewardship area.

Director-General's decisions

[29] Palmer J outlined the steps leading to the Director-General's decisions.[8] Those which are relevant to our decision start with HBRIC's formal proposal to the Department on 26 August 2014 to exchange the Smedley Block for the 22 hectares which comprises two separate strips of land. One is of eight hectares running along one bank of the Makaroro River. The other is of 14 hectares along the nearby Dutch Creek, one of the Makaroro's tributaries.

[30] On 9 December 2014 the Department prepared an extensive briefing paper for the Minister, recommending acceptance of the proposal while noting that the 22 hectares possessed "high values". On 11 December 2014 the Acting Deputy Director-General formed an intention to revoke the status of the 22 hectares as a conservation park to facilitate the land exchange. He decided to notify his intention publicly. Submissions were called for by a press release issued on 12 December 2014. Two submissions supported the application; seven submissions objected.

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8 HC decision, above n 3, at [31]–[45].

[31] The Director-General appointed a hearing convenor, Reginald Kemper, then the Director of Conservation Partnerships. Mr Kemper decided further information was required, including a more comprehensive gathering and evaluation of all conservation values. In particular, biological data and technical information applicable to each of the 22 hectares and the Smedley Block was called for, and Mr Kemper commissioned a team of the Department's scientists to prepare a report for this purpose (the Science Report).

[32] The Science Report was submitted on 27 May 2015. Its authors undertook a comparative analysis of the ecological and biological values present in both pieces of land. In their opinion the exchange would enhance the conservation values of land managed by the Department from both an ecological and biological point of view. According to the Science Report, the Smedley Block is underpinned by a different geology from the 22 hectares and supports different ecosystems not currently present in the RFP.

[33] The Science Report included these assessments of the 22 hectares:

(a) The eight-hectare strip alongside the Makaroro River had no emergent podocarps remaining and was in a poor condition. The remaining 14-hectare area including part of Dutch Creek was also logged and was in other respects similar to the surrounding RFP.

(b) Some values on the land were *rare* — in particular, riverine alluvial plains at Makaroro — and *significant* — an oxbow wetland on Dutch Creek. However, both these land environments were represented on other public conservation land nearby.

(c) The Smedley Block had a different geology from the RFP which complemented what was called the Gwavas Conservation Area, whereas the 22 hectares "makes a disproportionately much smaller contribution to the present values of the [RFP]".

[34] The Society filed an affidavit from Kelvin Lloyd, a senior ecologist who has published widely and has extensive experience in his field. He accepted that the Science Report provided a more comprehensive account of the values of the 22 hectares than had previously been provided. He did not challenge its methodology or conclusions.

[35] Mr Lloyd addressed a later report prepared by a departmental officer following public feedback on the Science Report. He noted that in making an updated ecological significance assessment the officer had concluded that streams in both the Makaroro River and Dutch Creek parcels were significant in terms of diversity and pattern, rarity and special features, and naturalness. The officer also referred to the presence of indigenous vegetation on some of the environments within the 22 hectares. Together with braided-river habitat in the Makaroro area, they were the primary factors responsible for giving these sites high significance. Also, at times the Makaroro area will provide habitat for fish and the presence of sedges indicates wetland vegetation.

[36] While disagreeing with the officer's comment that the Makaroro area is fragile, degraded and under threat from woody weeds which would inhibit future rebuilding of the vegetation, Mr Lloyd agreed with the officer's assessment of the 22 hectares as ecologically significant according to several criteria. He recorded also the consensus between himself and two ecologists engaged by HBRIC that "the entire area of indigenous vegetation and habitat within [the 22 hectares] was ecologically significant".

[37] Mr Kemper swore an affidavit. He said that in preparing his report for the Director-General he took into account the Science Report's conclusions. He considered the historic and recreational values of the 22 hectares. He found that none of the land was being used for outdoor recreation. He was satisfied that revoking the special protection designation would meet the purpose of the Act by enabling protection of the natural and historic resources "of the area" and facilitate public recreation and enjoyment. He was satisfied that the values in the 22 hectares do not need to be retained for conservation park purposes where revocation will enable a land exchange allowing "better conservation value [to be] obtained … for

addition to the RFP" and "enhanc[ing] the conservation values of land managed by the Department".

[38] The Director-General, Lewis Sanson, also swore an affidavit outlining the process he adopted following receipt of Mr Kemper's report. He took into account the report and all the information contained in 11 separate accompanying documents. He also took into account the Society's objections and assertion that it was not open to him to revoke the conservation park purpose in order to progress the proposed exchange. He assessed the scientific information. He was in no doubt that HBRIC's proposal would enhance the conservation values of land managed by the Department and promote the Act's purposes. He was referring to the conservation values of the RFP as a whole and the broader conservation estate.

[39] In his affidavit, the Director-General observed that the Science Report concluded the Smedley Block scored more highly in terms of significance than the 22 hectares, which is the reason why he was "satisfied that land managed by the Department would be enhanced through the exchange based on the current and future conservation values of the Smedley [Block]".

[40] Following a visit to the RFP and the Smedley Block, the Director-General requested the Department to investigate boundary rationalisation of the Smedley Block, wilding pine eradication there and whio (blue duck) habitat enhancement in the upper Makaroro River. He also imposed a requirement that revocation be subject to HBRIC taking title to the Smedley Block.

[41] On 5 October 2015, the Director-General made formal decisions in accordance with Mr Kemper's recommendation:

> 24. As a result, and acting under delegation from the Minister of Conservation, I have decided:
>
> (a) To declare the [22 hectares] to be held for conservation purposes, as this is necessary for 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 [22 hectares] as a conservation park on the basis that I wish to progress the

proposed exchange of the [22 hectares] for the Smedley [Block]:

(c) Subject to a Gazette notice giving effect to my decision to revoke the conservation park status of the [22 hectares]:

(i) To authorise the proposed land exchange under s 16A(1) of the Act on the basis that I am satisfied on the information 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 [Block] for the purpose of a conservation park and include it in the [RFP]; and

(iii) To give notice of these last two decisions in consequential order in the Gazette after gazettal of the earlier decisions set out above.

[42] It is implicit in the revocation and exchange decisions that the Director-General was aware that, by virtue of s 61(3), the 22 hectares were deemed to be held for the purpose of a conservation park once he had made the decision to declare the land to be held for conservation purposes (the land being previously deemed to be held for the purposes of a conservation park by s 61(2)). The Director-General relied on s 18(7) in his revocation of the conservation park purpose for which the 22 hectares was held. The decisions were subject to HBRIC taking title to the Smedley Block.

An alternative process?

[43] It is convenient at this point to deal with an alternative statutory pathway proposed by the Crown. Mr Prebble emphasised that no assessment of the value of the 22 hectares was undertaken when the RFP was deemed by s 61(2) to be a conservation park and held for conservation purposes. He said the enactment of s 7(1A) by s 3 of the Conservation Amendment Act 1994 gave the Department the option of avoiding s 7(1) such that the deeming provision under s 61(3) would not be triggered:

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.
>
> …

No reference to s 7(1A) was inserted into s 61(3) which, on Mr Prebble's submission, provides a direct route enabling revocation of the status of deemed conservation land; the Director-General could have immediately declared the land held for conservation purposes as a stewardship area. Mr Prebble said the Department did not take that step here simply to ensure there was a public process available. Nevertheless, these statutory provisions confirm that the 22-hectare land is not immune from exchange.

[44] This argument does not assist the Director-General. The availability of another process does not absolve the Director-General from an obligation to act in accordance with the statutory requirements once he decided to give public notice of HBRIC's proposal in accordance with s 7(1). The Department explained its reasons for following a process of public consultation in its briefing paper prepared on 9 December 2014. Once it took that step, any resulting decision to revoke had to be made lawfully.

[45] In any event, the legislative history indicates that a direct route to stewardship was never intended by Parliament. The relevant provision first appeared in cl 3 of the Conservation Amendment Bill (No 2) 1993 and the explanatory note summarised its effect as follows:[9]

> *Clause 3* amends s 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 …

Prior to this technical amendment, s 7(1) required a joint declaration from the two relevant Ministers. Debates surrounding the amendment focussed solely on the

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[9] Conservation Amendment Bill (No 2) 1993 (251-1) (explanatory note) at i.

reasons for deleting the requirement to gain the approval of a second Minister.[10] There was never any suggestion that Parliament intended for it to allow the sole decision-maker to circumvent deeming provisions in the manner contended by Mr Prebble; the failure to insert a cross-reference to s 7(1A) under s 61(3) must be attributed to legislative oversight. And even if the Director-General could avoid the effect of s 61(3), the declared designation would have to be made lawfully in accordance with the proper purposes prescribed by the Act.

High Court decision

[46] In reviewing the Director-General's exercise of the s 18(7) power, Palmer J asked whether taking account of the proposed land exchange could be rationally regarded as coming within the statutory purpose of revoking the specially protected status of a conservation park.[11] He was satisfied that the Act did not require a narrow interpretation of the meaning of "conservation" or "conservation purposes" as posited by the Society's argument; or that a revocation decision relating to particular land must only take into account that land.[12] In his judgment those phrases must be interpreted broadly and the statutory text did not require the preservation or protection of a single resource "if that diminishes conservation purposes in New Zealand more broadly conceived".[13]

[47] The ratio of Palmer J's decision was as follows:

> [70] I do not agree that a proposed land exchange is an irrelevant consideration when considering whether to revoke the specially protected status of land. Each decision being legally distinct does not require the decision-maker to blind themselves to a proposed land exchange in making the revocation decision. It would be artificial and inimical to good public administration for public objections and submissions on a revocation, and the revocation decision itself, to be prevented by law from taking into account the merits of the proposed land exchange. Rather, I consider that doing so may well constitute failing to take into account a relevant consideration which would be contrary to the law of judicial review.
>
> [71] What matters more is the basis on which a revocation decision is made. The promotion of the purposes of the Act is the guiding light for both the revocation decision and the exchange decision. In addition, the exchange decision requires, explicitly in s 16[A](2), the decision-maker's satisfaction

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10 (10 June 1993) 535 NZPD 15732 and 15743–15744.
11 HC decision, above n 3, at [56].
12 At [59].
13 At [61].

> that the exchange will enhance the conservation values of land managed by [the Department]. Enhancing the conservation values of land managed by [the Department] is not the test for the revocation decision, which involves a broader conception of conservation purposes than only reference to what happens on land managed by [the Department]. In making the revocation decision, the decision-maker must satisfy himself or herself that there is a good and proper basis, founded in conservation purposes, for the revocation. And, as I find above, a broad interpretation of conservation purposes is required.

[48] On this basis the Judge found that Mr Kemper's report "came perilously close to risking the wrong legal test being applied to the revocation decision".[14] He noted that the statutory test in s 16A was the only test identified by Mr Kemper when recommending revocation to the Director-General — that is, whether the exchange "would enhance the conservation values of land managed by the Department and would promote the purposes of the Act". He observed that the phrase was "formulaically recited in the decision paper and its recommendations".[15]

[49] Palmer J also had difficulties in establishing the basis on which the revocation decision was made.[16] He considered that statements made by the Director-General in his affidavit suggested he too was referring only to the narrower test provided by s 16A. Nevertheless, in the event the Judge found:

> [79] … 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 [the Department] by [HBRIC]. 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 meets the purpose of the Conservation Act and is a good outcome for the Department and conservation".
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> (Footnotes omitted.)

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14 At [75].
15 At [75].
16 At [78].

Analysis

[50] Mr Salmon for the Society posited the ultimate inquiry on appeal as being to identify the purpose or purposes for which the Act has conferred the powers to declare and revoke specially protected status. He distilled the essence of the competing cases by way of two questions. Is the power conferred (as Mr Salmon submitted) to enable the Director-General to ensure that the legal status of conservation land accurately reflects its actual conservation value? Or is the power conferred (as Mr Prebble submitted for the Crown) to enable the Minister to revoke special protection status where it would enable him or her to enhance the overall conservation estate by exchanging conservation park land for other land?

(1) Interpreting the statutory powers

[51] In accepting the Crown's case, Palmer J asked whether taking account of the proposed exchange could be rationally regarded as coming within the purpose of revocation of special protection status, adopting a broad interpretation of conservation purposes. In formulating this approach Palmer J relied on the Supreme Court's statement in *Unison Networks Ltd v Commerce Commission*:[17]

> Often, as in this case, a public body, with expertise in the subject matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

[52] However, in *Unison Networks Ltd* the Commerce Commission was exercising a statutory power under a new scheme designed to regulate prices charged by large electricity lines businesses in New Zealand. When deciding to impose an initial price path threshold for a fixed period, the Commission was clearly acting as an expert public body exercising broadly expressed powers to achieve economic objectives. It was given a broad discretionary mandate to achieve what the Supreme Court noted were expansively expressed economic objectives. Indeed, a

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[17] *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53], quoted in HC decision, above n 3, at [55].

court's reluctance to interfere unless such a body has plainly exceeded its powers or acted irrationally is well settled.

[53] This case arises in a very different statutory context. As *Unison Networks Ltd* confirms, a discretionary power, even if conferred in unqualified terms, must be exercised consistently with and to promote the relevant statutory purpose and policies.[18] The pursuit of another purpose or policy is not prohibited providing it does not compromise or thwart that primary legislative purpose and policy.[19] Two conclusions necessarily follow. First, when deciding on revocation the Director-General must be guided primarily by the text and purpose of the Act, and where appropriate the legislative history, not by general policy considerations said to be drawn from the broader framework. Second, we disagree with Palmer J's view that the decision-maker discharges his or her statutory responsibility if satisfied there is 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.

(2) Purpose of specially protected areas

[54] Our starting point is with the long title to the Act. Its stated purpose is to "promote the conservation of New Zealand's natural and historic resources" which the Department is established to carry out. Conservation is described as meaning "the preservation and protection of natural and historic resources" for the purpose of maintaining "their intrinsic values". In relation to each particular resource, preservation and protection mean "maintenance, as far as is practicable, of its intrinsic values"; and in "its current state" including its enhancement.

[55] It might be said that these factors fail to provide guidance to the decision-maker when assessing special protection because stewardship areas are also conservation areas subject to the same underlying conservation purposes. Indeed, the Honourable Simon Upton (speaking from "the development side of the argument") noted at the second reading of the Bill that there was "an identical

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18 *Unison Networks Ltd*, above n 17, at [53].

19 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030 per Lord Reid.

formula" for the management of conservation parks and stewardship areas insofar as both were to be managed so that their natural and historic resources are protected, which he feared would render the latter "holding-pen category" immune from disposal.[20] He was informed by the Honourable Philip Woollaston that while the regime required "the same standard of care and protection … while they are held as stewardship areas", the crucial distinction was that "there is a mechanism for their disposal for some other use if the decision is that they should not be permanently protected".[21] It follows that permanent protection — at least within the ambit of the administrative regime — is the defining feature of specially protected areas, which does not extend to stewardship areas.

[56] We agree with Mr Salmon that Parliament has deliberately demarcated separate designations, each being subject to distinct management regimes, to advance the core objectives of the Act. 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.[22]

[57] The whole concept of conservation is predicated upon maintenance of the status quo once land is found to meet the statutory requirements of protection and preservation. Similar emphasis was given by Randerson J in *North Shore City Council v Minister of Conservation* to the preservation and protection of natural resources, safeguarding the options of future generations, and requiring a long-term view of conservation decisions "as to ensure that future options for the land (including those which may not yet be foreseen) are not foreclosed".[23] These

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20 (24 March 1987) 479 NZPD 7979–7980.
21 (24 March 1987) 479 NZPD 7983.
22 *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 352.
23 *North Shore City Council v Minister of Conservation* [2003] 2 NZLR 497 (HC) at [42].

references to future options might risk the implication that the land's potential utility ought to weigh in the decision-making assessment. But any such instrumental value can only be realised through legislative intervention; once the land qualifies for special protection, the statute forecloses such considerations by compelling the Director-General to address only the intrinsic values of the land concerned.

(3) Purpose of conservation parks

[58] When the Director-General attends to the intrinsic values of a specially protected area, he or she must keep in mind its particular designation. The existing protection or preservation requirements declared under s 18(1) necessarily inform the assessment of whether to revoke or vary under s 18(7) the purposes for which the land is held. By virtue of s 61(2) and, upon declaration, s 61(3), the 22 hectares were deemed to be specially protected for the purpose of a conservation park.

[59] What then is the purpose of a conservation park? Section 2(2) offers the tautology that "conservation park" means an area held for "park … purposes" under s 18(1). The legislative history sheds further light on the purpose of the designation.[24] Prior to the enactment of the current regime, s 63B(1) of the Forests Act provided for the establishment of State forest parks "for the purpose of facilitating public recreation and the enjoyment by the public of any area of State forest land". The transitional provisions under s 61 of the Act contemplate the presumptive passage of such forest parks to special protection as conservation parks, thereby maintaining their territorial integrity for public recreation under the successor regime.

[60] At the second reading, the Honourable Simon Upton implied that "recreation areas" under s 17 of the Reserves Act 1977 broadly overlapped with the category of conservation parks as proposed under the Bill.[25] This highlights Parliament's working assumption that recreation would be a central component of park purposes and therefore inform assessments of whether land is to be held as a conservation park rather than as a different kind of specially protected area. Indeed, under s 19(1)

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[24] Unfortunately the Planning and Development Committee did not publish a report: [1986–1987] XI AJHR I11 at 4.

[25] (24 March 1987) 479 NZPD 7982.

every conservation park is managed to facilitate public recreation and enjoyment, subject to the protection of its natural and historic resources.

[61] We do not accept the argument advanced by Messrs Prebble and Cooke QC that for all practicable purposes the conservation values of stewardship and conservation parks can be treated as the same. Both sought to emphasise that there is no material difference between the intrinsic values of each; and that the additional emphasis on recreation and enjoyment was the only substantive difference between the management of stewardship areas and conservation parks. Mr Cooke submitted that the finding of Mr Kemper that none of the 22-hectare land was being used for outdoor recreation meant it was open to the Director-General to reclassify the land as a stewardship area.

[62] In our view, the importance of recreation to park purposes and therefore the management regime serves to distinguish the designation of conservation park from other specially protected areas once the land concerned has crossed into special protection. But it does not permit a 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. In any event, the Director-General did not adopt the expedient approach suggested by Messrs Prebble and Cooke. To do so would be directly contrary to the statutory scheme and undermine the protection that flows from a conservation park's status as a type of specially protected area.

(4) Disposal of conservation areas

[63] The disposal and revocation provisions of the Act reinforce its core purposes. Section 7(1) is expressed in absolute terms: once land is declared to be held for conservation purposes — in this case, conservation park purposes — it shall thereafter be held subject to the provisions of the Act. And s 16(1) reinforces the prohibition on disposal "except in accordance with [the] Act".

[64] Only two provisions allow for disposal of land which is declared to be held for conservation purposes, and then only if it is designated as a stewardship area. As discussed above, by s 16A(1) the Minister may exchange stewardship land but

only if satisfied that the transaction will enhance the conservation values of land managed by the Department and promote the purposes of the Act. By s 26 the Minister may also dispose of stewardship land outright, but only if 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. The terms of these exemptions, expressly limited to the enhancement of conservation values, are important.

[65] All counsel focussed particularly on the combined effect of s 16A and s 18(7). Mr Prebble submitted that ss 10 and 11 of the Conservation Law Reform Act 1990, which led to the substitution of s 16(1) in its present form and the introduction of s 16A, clearly signposted Parliament's intention to permit protected land to become stewardship areas under the Act by creating flexibility in authorising land exchanges. In particular, Mr Prebble submitted, the amended Act removed any delineation between protected and stewardship land in s 16(1) by referring to a prohibition upon disposition of a "conservation area or interest in a conservation area"; allowed the Minister to exchange stewardship land if satisfied under s 16A(2) that the swap would "enhance the conservation values of land managed by the Department and promote the purposes of [the] Act"; and confirmed that Parliament did not intend that the use of s 18(7) was to be limited to land which had lost its intrinsic conservation value.

[66] We agree with Palmer J's rejection of Mr Prebble's submission to the same effect in the High Court that the exchange mechanism set out in s 16A was intended to apply to specially protected conservation areas.[26] Section 16A(1) and its legislative history confirm Parliament's intention that any mechanism for exchanging conservation areas was to be limited to stewardship areas alone. Mr Prebble's submission strains the plain meaning of ss 16 and 16A and its principled mechanism for exchanging stewardship land. The exchange concept was originally introduced through cl 11 of the Conservation Law Reform Bill 1989, which proposed that the new s 16A should provide for exchanges of all conservation areas. But Parliament later adopted an express limitation on that right to stewardship areas only.

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[26] HC decision, above n 3, at [67].

(5) Revocation of special protection

[67] Mr Prebble submitted that s 18(7) is a governance rather than a management discretion: at this higher level, a decision to revoke special protection will consider both the protective status or purpose of the land and also the Act's wider purpose to promote conservation over New Zealand's natural and historic resources. The ultimate question is whether the consequences of revocation will secure an overall benefit to the RFP and the overall conservation estate, as the Director-General in fact decided. Thus, in his submission, relative conservation values are a relevant consideration within the s 18(7) inquiry.

[68] However, 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.

[69] In this respect, Mr Cooke sought to buttress the Crown's position by reliance on the requirement imposed by s 19 to manage "every conservation park" to protect its "natural and historic resources". In this case the requirement related to the RFP as a whole, with the focus on its natural and historic resource values, rather than a discrete spatial unit such as the 22 hectares, thereby allowing the broad and holistic approach adopted by the Director-General. We reject that proposition. The revocation decision related to a specific area of land being "the land concerned" identified in s 18(1), and the Director-General's inquiry was directed to its conservation values. Mr Cooke's submission does however hint at a deeper problem

with the Department's assessment of the 22-hectare land in isolation from the rest of the RFP.[27]

(6) Conclusions

[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 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.

Lawfulness of the revocation decision

[72] In this case we agree with Mr Salmon that the Director-General's decision was based predominantly if not solely on the s 16A criterion. Palmer J agreed that Mr Kemper's approach appeared wrongful for that reason, noting that his recommendation related to a proposal "that an area of private land be exchanged for land as part of the [RFP]" with the consequential risk of applying the wrong legal

[27] See [77] of this judgment.

test to the revocation decision.[28] The relevant briefing papers prepared by the Department were to the same effect. Nevertheless, despite his difficulties in establishing the basis for the revocation decision,[29] the Judge absolved the Director-General from responsibility for the same error because he (a) "relied on his staff's broader assessment of the conservation values of *the Smedley Block*"; and (b) was satisfied that the result "well and truly meets the purpose of the Conservation Act and is a good outcome for the Department and conservation".[30]

[73] We have emphasised the Judge's reference to the Smedley Block because it simply reinforces the error which he identified in Mr Kemper's approach — that is, the Director-General's sole or predominant focus was on the exchange proposal without reference to the requirement to preserve or protect the intrinsic values of the 22 hectares which, we repeat, departmental staff had earlier rated as "high".[31] The Director-General did not take into account or consider whether the 22 hectares should no longer be held for conservation park purposes when he had simultaneously declared that it should have that status. Instead he revoked its statutory purpose as a conservation park solely to progress the proposed exchange.

[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.

[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

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28 HC decision, above n 3, at [75] and [78].
29 At [78]–[79].
30 At [79].
31 See [30] of this judgment.

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.

[76] It is important to emphasise the distinct designations provided by the Act. Parliament clearly intended for declarations conferring additional specific protection or preservation requirements to identify the particular purposes for which the land is to be held such that the management regime matches the reasons for its special protection. In the present case, the ecological and biological inquiry undertaken by the Department resulted in the recommendation that the 22 hectares (briefly) and the Smedley Block should be held for the purpose of a conservation park. This comprehensive survey of the area's natural resources is very helpful for its ongoing management in accordance with s 19. But it is the presence of park purposes that must inform an assessment whether to vary or revoke the designation of a conservation park. It is striking to note the ecological focus of the assessment without mention of the other possible designation mentioned in s 18: under s 2(2), an *ecological area* is held for ecological purposes and, under s 21, is "managed as to protect the value for which it is held".

[77] This anomaly invites the inference that the Department was not concerned with reaching the correct statutory designation and serves to highlight the overall artificiality of the Department's decision-making process. The 22-hectare land is but a small and peripheral component of a greater 94,000-hectare whole that, to quote the tagline on the Department's webpage for the RFP, "consists of beautiful bush-covered ranges *with a range of recreation opportunities*" (emphasis added). It must be contrary to the conferral of specially protected status under the Act, which secures the land for the options of future generations, to then carve away discrete sections from the broader conservation park for individual assessment. While the

borderlands of the RFP may not be the immediate site of recreation and enjoyment, they provide a protective cloak for the range of recreation opportunities — tramping, hunting, fishing, camping, mountain biking — enjoyed in the heart of the conservation park. Further, to allow the Director-General's decision would be to permit the territorial erosion of former forest parks in a way which defeats the statutory presumption of preservation and protection effected by the transitional provisions under s 61.

[78] The process followed by the Department and the Director-General confirms that the revocation decision was made for the sole purpose of expediting the proposed exchange. Palmer J 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 exchange.[32] But the three successive and interrelated decisions were in fact a single step. The Director-General did not suggest, for example, that the first step would be made without or truly independently of the next two.[33] The decisions were never intended to stand alone. All were collapsed into what was a solitary decision to exchange the land by the means of revoking its designation.

[79] It is relevant, as Mr Salmon submitted, that if, as the Director-General found, the Smedley Block was worthy of protection and incorporation within the conservation estate, the Department could have sought to acquire it. While HBRIC's exchange proposal came as a comprehensive package, it was open to the Director-General to determine whether the Department should attempt to buy the Smedley Block directly from its owner. That step would serve his purpose of adding to or enhancing the conservation estate without in any way compromising the existing designation of the 22-hectare block.

[80] In our judgment the only inference available from the process adopted throughout by the Department and endorsed by the Director-General is that it led to an unlawful decision. 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).

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32 HC decision, above n 3, at [68].

33 See [41] of this judgment.

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). The revocation decision was unlawful and should be set aside.

[81] In view of our conclusion on the Society's primary ground of appeal it is unnecessary to consider its alternative ground of appeal based on the Conservation General Policy. The cross-appeal must also be dismissed.

Result

[82] The appeal is allowed.

[83] The cross-appeal is dismissed.

[84] The decision of the Director-General made on 5 October 2015 to revoke the special protection designation of a defined part of the Ruahine Forest Park is set aside, with a direction that he reconsiders the application made by HBRIC to exchange that land with the Smedley Block in accordance with the terms of this judgment.

[85] There will be no order as to costs.

ELLEN FRANCE P

[86] I would dismiss the appeal. Essentially, I agree with Palmer J for the reasons he gave.

[87] It follows that I consider the Director-General was required to make two separate decisions, that is, 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. I also consider that, in making the first decision to revoke the status of the land, the Director-General was not limited to a consideration of the conservation values of the 22 hectares of the RFP land. Rather, the Director-General

could consider conservation purposes more broadly. As Palmer J put it, the Director-General had to:[34]

> … satisfy himself … that there [was] a good and proper basis for the revocation founded in conservation purposes interpreted broadly. That is broader than being satisfied that an exchange will enhance the conservation values of land managed by the Department.

[88] Finally, I agree with Palmer J that the Director-General did satisfy himself of what was required.

[89] There is no dispute about the need for two separate decisions. The issue is as to the considerations permissible in reaching the decision to revoke. As to that, I consider the statutory scheme as a whole supports the view a broad interpretation of "conservation" and "conservation purposes" is intended. As Mr Prebble submitted, the purpose of the Act is the promotion of conservation and that may be achieved in various ways. It is also relevant that the definition of "protection", as well as encompassing maintenance, includes the "augmentation, enhancement, or expansion" of the resource.[35] In that sense, the focus was appropriately on the RFP as a whole. Finally, the revocation power in s 18(7) is not specifically constrained other than by reference to the need for a public notification process. A broad analysis is envisaged.

[90] As I see it, the strongest argument in support of the appellant's approach is the fact the Act provides for the exchange of stewardship land only. The change to the Conservation Law Reform Bill late in the piece to restrict exchanges to stewardship land supports the proposition that only if the land has no conservation values can its special protection be revoked. However, a number of points can be made that suggest this aspect of the Act is not determinative.

[91] First, 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. As Mr Cooke submitted, s 61(9) when read together with s 61(3) appears to contemplate a two-stage process, that is, revocation of specially protected status in

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[34] HC decision, above n 3, at [2] and see [61] and [71].
[35] Conservation Act 1987, s 2(1), definition of "protection", para (b).

favour of classification as stewardship land and then sale or exchange, because otherwise there can be no disposal as s 61(9) anticipates. That possibility is consistent with the fact the inclusion of forest parks in s 61 reflected to some extent at least a holding position pending further consideration of the appropriate management regime for this land. Some of this land, for example, can come out of the conservation estate by means of vesting in a State enterprise.

[92] Secondly, s 7(1A) on its face provides a means for the Minister to place the land in another category including stewardship. It is true that the present case must be analysed in terms of the statutory route that was adopted. But, as Mr Prebble submitted, the presence of s 7(1A) does suggest land that is covered by s 61 may be able to be treated as stewardship land and then exchanged. In other words, as the written submissions for the Minister state, this land is not somehow "immune" from exchange because its status could have been altered under s 7(1A).

[93] Thirdly, at issue is the management regime that should apply to the land. It must be relevant to that analysis whether this is land that should be able to be exchanged. 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 RFP and augment its features particularly the facilitation of public recreation and enjoyment.

[94] On the latter aspect, I would not downplay the difference in the conservation values of stewardship areas and those of conservation parks. But it is 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 RFP 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.

[95] It is useful also to contrast the different values and approach applicable to the other specially protected areas in pt 4. For example, s 20(1) states that provisions simply apply to every wilderness area, including that:

> (a) its indigenous natural resources shall be preserved:
>
> (b) no building or machinery shall be erected on it:
>
> (c) no building, machinery, or apparatus shall be constructed or maintained on it:
>
> …

[96] And sanctuary areas are to be "managed to preserve in their natural state the indigenous plants and animals in it, and for scientific and other similar purposes".[36] In other words, within the regime of specially protected areas there are greater or lesser degrees of protection.

[97] For these reasons, I support the conclusions of Palmer J as to the scope of the considerations relevant to the revocation decision. For completeness, I add that I see no error in the Judge's reliance on *Unison Networks Ltd*.[37] As I read the judgment, Palmer J was simply directing himself as to the need to ensure the decision-maker's approach was a rational one in the sense it came within the statutory purpose. That is just another way of saying it is necessary to consider the statutory scheme and decide what is relevant in terms of that scheme.

[98] Finally I note that, in accepting the finding of Palmer J that the Director-General properly directed himself in terms of the broader considerations, it is relevant to my decision that Mr Sanson took into account the conservation values of the 22 hectares of RFP land. This is apparent from his letter to HBRIC of 5 October 2015 in which he set out his reasons for his decision.[38] The Director-General considered those values were reduced by the fact the area had been "heavily logged in the past" and the black beech and broadleaf forests were "not

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[36] Section 22. The fact some types of areas require additional "protection" rather than "preservation" is reflected in the heading to s 18AA.

[37] *Unison Networks Ltd*, above n 17.

[38] These factors were all discussed in more detail in Mr Kemper's report to the Director-General, which set out in some detail the findings of the Science Report. That report also discussed the impact on other aspects including migratory fish species and loss of kōwhai as a food source for birds, for example.

substantial". The land environment, although "acutely threatened" was represented on the approximately 92 hectares of public conservation land "elsewhere in the district". Further, the "area of black beech [had] lost emergent podocarps to logging" though it also had a "small but significant oxbow wetland".

[99] Because it is immaterial given the view of the majority, I do not go on to consider the cross-appeal.

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Annex: Department of Conservation *Ruahine Forest Park Land Revocation and Exchange Map.*