Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

Submission on Modernising Conservation Land Management Discussion Document

To the Department of Conservation

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Submitter details

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Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Key points

- The discussion document proposes some far reaching changes, but does not always supply sufficient detail to enable readers to understand exactly how those changes would be operationalised in practice. The Department of Conservation (DOC) needs to spell out in greater detail how it envisages proposals, such as national decision making and the use of a net benefit test, would work in practice. This has limited my ability to provide feedback.

Proposals relating to the conservation management system

- The primary role of both the NCPS and the area plans should be to focus on the priorities governing the species and ecosystem conservation work DOC is required to do. The 'rules, boundaries and guidance for concessions' should be secondary and consistent with conservation priorities.
- There needs to be a better balance between national (ministerial and the Conservation Authority) and regional decision making (e.g. conservation boards, iwi/hapū), and between political (i.e. ministerial) and technical (e.g. departmental, CA and conservation boards) decision making.

Proposals relating concession allocation

- DOC should make greater use of competitive allocation to ensure that concessionaires pay a fair market price in return for the right to operate on public conservation lands and waters.
- When using competitive allocation, DOC should specify the environmental terms and conditions on which the concession is available at the outset, rather than allowing them to be balanced against other criteria.

Proposals relating to exchanges and disposals of conservation land

- Disposal of public conservation land should only be considered where the land has no or very low conservation value.
- A precautionary approach should be applied to land exchanges by requiring the inclusion of a margin of error, bottom lines and an additional layer of scrutiny. The latter could be provided via an independent review of the net benefit evaluation – perhaps by the Conservation Authority.
- Consideration should be given to excluding a much broader range of conservation land (e.g. non-stewardship land held under the Conservation Act) from being eligible for exchange.
- The net benefit test for land exchanges should relate to all land protected for conservation purposes in New Zealand – not just public conservation land.
- Land exchanges should be able to be facilitated by the inclusion of money, but the ratio of cash to land should be limited to a small fraction of the overall value of the transaction. Furthermore, any money should be ringfenced for two specific purposes: future land acquisitions, and any permanent improvements required to immediately raise the conservation value of the land received in a swap.
- The net benefit test should be binding, not subject to Ministerial discretion. Approval of the swap would still sit with the Minister.
- The traditional eco-centric approach to evaluating the conservation value of two parcels of land should be supplemented with an economic valuation of ecosystem services.
- As part of these proposals, the Minister of Conservation should set a target date for the classification of stewardship land.

Two overriding observations

The Department's consultation on Modernising Conservation Land Management includes a broad suite of proposals. This submission addresses three of them: changes to the conservation management system, the process for granting concessions, and the framework for exchanging and disposing of public conservation land. I comment on each of these in turn below. But before I do, let me make two overriding observations on the consultation document as a whole.

Firstly, many of the proposals are vague about what they are trying to achieve. Given the scale of the potential impact of the proposed changes, I would have expected to see evidence of more careful thought and problem definition. Having a clear understanding of the problems and opportunities up front allows for a much sharper analysis of options. This is particularly important because the conservation management system is a **system** of interrelated parts. Changes in one part will be felt throughout the system. My capacity to respond to the document is limited by its inadequacies.

The consultation's primary focus appears to be on concessions and land swaps, implying a primarily financial preoccupation on DOC's part. Actual conservation seems, at least in the consultation document, to be a secondary consideration. This is back-to-front given that the primary purpose of the department is to conserve New Zealand's natural heritage.

Secondly, there appears to be a prevailing assumption throughout the proposals that a nationally standardised approach to conservation is both possible and desirable. When it comes to the environment, I do not think a nationally standardised approach is always sensible because the demands of conservation differ in different places. The same goes for the communities and mana whenua whose enjoyment of DOC land is specific to local circumstances. Local knowledge, therefore, needs to be a part of any decision making. This is as true for public conservation land and the conservation systems as it is for the rest of New Zealand and the resource management system.

When looking at conservation, we need to apply both a national and a regional lens. Looking through the national lens, we need our conservation system to ensure that we preserve ecosystems and species in a way that is nationally representative. That means ensuring we enable and resource DOC to protect a variety of ecosystems and species, to ensure that there are healthy samples of ecosystems and populations of particular species at least somewhere in New Zealand. That needs to be DOC's top priority.

However, taking a regional approach is also important. We don't just do conservation for conservation's sake (although that is important); we also do conservation because New Zealanders care about it and want to engage with it in the places they live as well the places they might visit on holiday. Most New Zealanders will have favourite DOC reserves in their regions. Different hapū and iwi will have also have their own taonga and significant places on public land that needs to be protected. For that reason, access to public conservation land and the experiences it can offer is a regional issue, not just a national one.

For example, the major urban centres of the North Island are quite distant from National Parks. That means regional conservation land, such as Tararua and Ruahine Forest Parks for the lower North Island and Pirongia, Coromandel and Kaimai Mamaku Forest Parks for the upper North Island, become more important.

I recognise that DOC has only limited resources and must prioritise. I also recognise that DOC wants to simplify and speed up the currently cumbersome processes. However, there are valid reasons to include both a national and a regional lens in decision-making processes. This requires thinking hard about subsidiarity – who decides what. From this consultation document, I'm not convinced this thinking has been done.

Proposed changes to the conservation management system

I will only comment briefly on the proposal to rationalise the number of strategies and plans DOC is required to produce and maintain. I broadly support the intent of having fewer plans and a simplified hierarchy, although I have some concerns. I am less convinced about the merits of altering the process for authorising these documents and, in particular, why it is necessary to reduce the influence of the Conservation Authority and conservation boards.

Scope and scale of plans

Consistent with my comments above about the importance of both national and regional, I support the proposed hierarchy of a national plan and then area plans. I have concerns, though, about whether 'area' is the right spatial unit and the proposed narrow scope of the plans.

The consultation document says that it is not proposed to unify "all plans in an area into a single master plan". This implies that a region is likely to have multiple plans. Multiplied across New Zealand that could mean many tens or hundreds of plans. While the consultation document talks about areas for the plans being set "at the right scale" and not too small, no guidance is given on how that will be determined.

I think it is important to have specific plans for different ecological areas within a region. But I also think it is important, if we are to manage conservation for both national and regional representativeness, that there needs to be a compilation of area plans at the regional level. This could be a regional plan that has provisions where consistency across area plans in the region is desirable, with chapters for each area plan in the region where bespoke approaches are warranted. This would allow for both specific management of local conservation issues and allow for managing regional conservation outcomes, including representativeness. There is a real risk that if we do not provide a regional 'overview' to area plans that we could end up with a more fragmented and less integrated conservation system.

I have serious concerns about the proposed scope of both the National Conservation Policy Statement (NCPS) and the areas plans. The discussion document proposes they be focused on "setting rules, boundaries and guidance for concessions". This is a very transactional approach to the conservation system that ignores the primary purpose of the conservation system, which is in essence, to protect and enhance New Zealand's biological and other heritage. The NCPS should not only be setting rules, etc, around concessions, but should be providing guidance and clarity about what New Zealand's national conservation priorities are and how they are to be achieved. That will allow DOC to prioritise its resources and actions to achieve those outcomes. A key piece of direction would be what national representativeness means in terms of priority mixes of ecosystems and species. Similarly, at a regional and/or 'area' level, regional conservation outcomes need to be spelt out, including what the priorities are to ensure a mix of ecosystems and species that are regionally representative, as well as rules and guidance around access to and use of public conservation land in the area.

Recommendation:

- The primary role of both the NCPS and the area plans should be to focus on the priorities governing the species and ecosystem **conservation** work DOC is required to do. The 'rules, boundaries and guidance for concessions' should be secondary and consistent with conservation priorities.

Decision-making process

I also have concerns about the degree to which it is proposed to centralise decision making with the Minister, especially for regional or local area conservation issues. As I have noted above, the conservation needs differ from place to place. Managing them well requires a mix of central oversight and pooled expertise, and (critically) local knowledge and understanding.

I see sense in the Minister being a key decision maker for national level conservation guidance, such as for the proposed NCPS. The case is strongest for Ministerial decisions on the general conservation outcomes to be achieved nationally. The case is weaker when it comes to setting specific rules, boundaries and guidance, which might better be left to technical experts, such as the Conservation Authority and the department itself.

The observation in the consultation document that existing arrangements "fetter ministerial decision making" begs the question of what the proper role of the minister should be. It implies that all decisions about conservation should be subject to political discretion. When an estate as large and significant as DOC's is being managed, not just on behalf of today's citizens but future generations of New Zealanders, it may well be prudent to fetter the decision-making power of someone who is, by definition, a temporary holder of the office subject to the political exigencies of the moment. I have not explored this matter in detail, however, and look forward to the advice of those community-based organisations that work closely with the Department.

It would be a Herculean task for the Minister to be the decision maker in respect of many tens or hundreds of area plans. How is the Minister supposed to be across so many details and local issues? Greater thought needs to be given to subsidiarity; what decision is made at what level. What is needed is a nationally consistent approach with sufficient flexibility to account for local circumstances. That could be achieved by setting a decision-making framework nationally, but then allowing local conservation boards and DOC regional staff to make decisions by applying the framework. DOC national office would still be able to exercise a balanced degree of central control in how it allocates resources and what those resources can be used for.

Lastly, the document provides a good description of DOC's obligations under section 4 of the Conservation Act concerning Te Tiriti. However, the recommendation to centralise decision-making appears to run counter to those obligations if its effect is to remove the opportunity of hapū/iwi to exercise rangatiratanga in respect of taonga and significant sites to which they whakapapa and that may be impacted by concessions and other activities. Given the Minister's own stated goal of "[s]trengthen[ing] relationships with Iwi/hapū for better conservation outcomes"[1], the Department should revisit this element of its proposals to ensure they are consistent with section 4.

Recommendation:

- There needs to be a better balance between national (ministerial and the Conservation Authority) and regional decision-making (e.g. conservation boards, iwi/hapū), and between political (i.e. ministerial) and technical (e.g. departmental, CA and conservation boards) decision-making.

1 https://www.beehive.govt.nz/release/new-priorities-protect-future-conservation

Proposed changes to the concession system

Interactions between conservation planning and concessions

Enabling a class approach in the National Conservation Policy Statement and/or area plans

In principle, I support the proposal to introduce a "class approach" to concession permitting. Specifying the activities that are permitted in advance (or exempt from needing a concession altogether) should allow DOC to spend less time processing high volume low impact applications and focus on those that are most significant. It is worth noting that a similar approach is used in New Zealand's resource management system.

These administrative benefits potentially come with environmental risks, however. Activities permitted in advance (or exempted altogether) will be subject to less environmental scrutiny than those that go through the normal concessions process. As such, much depends on the sorts of activities that are assigned to each class.

The consultation document sets out the sort of criteria that could be used to distinguish between different classes of activities. Exempted activities would be "minimal impact activities, where the risk of cumulative effects … is low". Permitted activities would be "low risk activities for which effects assessment and setting of conditions can be fully standardised". Those definitions seem reasonable enough. I would only note that in the (future) conservation management planning system envisaged by the consultation document, decisions about what is "minimal impact", "low risk", or amenable to standardisation will ultimately be made by the Minister rather than the Conservation Authority or Conservation Boards.

Those judgments should be based on the evidence and do not require political judgment, which will inevitably be open to all sorts of special pleading and other pressures. The reduced influence of Conservation Boards has the potential to become problematic in situations where the activity in question has negative spillovers (e.g. noise and congestion) for local communities. As an example, certain activities may have minimal impact in some locations but a larger impact in others, due to sheer weight of numbers. Again, some careful thinking about subsidiarity would be useful.

I have two other concerns with the proposed class approach to concessions.

The first is how it will interact with the activity limits specified in statutory planning documents. These are an important tool by which DOC can manage the cumulative effects, including noise and congestion, of certain kinds of commercial activity. Two of the activities identified in the consultation document as potential examples of permitted activities – commercial transport in formed car parks and drone use – have exactly those sorts of effects. How these activities could be made subject to any activity limit if they are "permitted in advance" is unclear. As mentioned below, prices can be used to manage demand, but the Department needs to be a lot clearer about how it envisages this would work.

The second is the involvement of iwi to develop classes at the national level that may impact significant areas, like wāhi tapu. One example in the discussion document (Table 4: Options for taking a class approach to concessions) notes that non-extractive research could be an exempt activity at the NCPS level, meaning that a permit is not needed. However, there are many wāhi tapu sites on conservation land where this 'non-extractive research' would still be inappropriate – for example, caves in which human bones have been interred. Without hapū/iwi assisting in the development of these classes as they apply to their specific rohe, risks exempt activities occurring adjacent to wāhi tapu in breach of DOC's obligation to actively protect taonga and significant sites.

Standardised concession terms and conditions in the National Conservation Policy Statement

I support the proposal to include **some** standardised terms and conditions for concessions in the National Conservation Policy Statement. These, unlike conservation management decisions, do lend themselves to nationally standard treatment. Again, this should help to streamline the concessions process.

There are, however, at least two aspects of this proposal that need further consideration.

The first is that not all of the terms and conditions that DOC may wish to include in a concession contract can be standardised. Environmental conditions are a case in point. The environmental impacts of a heli-walk operation on Franz Josef glacier will be entirely different to a guided kayak tour in Abel Tasman National Park. The environmental impacts of that guided kayak tour may well be different again if it was to occur somewhere else in the conservation estate. For this reason alone, DOC will need to continue setting at least some terms and conditions on a case-by-case basis.

The second is the risk that standardised activity fees set out in the National Conservation Policy Statement become the norm rather than the "price floor" envisaged in the consultation document. As discussed in more detail below, I support the idea that the Minister of Conservation should "retain the ability to seek a return greater than the regulated rate by auctioning or tendering the opportunity." Nevertheless, it is not difficult to imagine a situation in which concessionaire opposition to competitive allocation results in regulated fees becoming the default. With those dynamics in mind, it is worth considering **not** prescribing standardised fees for those concessions that DOC may seek to award competitively.

I also think it is worth touching on the rationale given in the consultation document for the introduction of standardised concession fees. I note the following statements:

- Regulated concession fees would "increase efficiency by removing prolonged negotiations with applicants who otherwise may refuse to sign their concession, in many cases believing that the Government will not suspend or cease their right to occupy and operate."
- "Pricing of concession rents and royalties is difficult, contentious and often leads to lengthy disputes. Incentives are limited for existing concessionaires to agree to new terms and conditions for ongoing activities."

No doubt these sorts of disputes consume considerable amounts of DOC's time. Giving activity fees greater regulatory weight is certainly one way of addressing that. But it is not the only way. There is nothing in New Zealand's conservation legislation that gives concessionaires the right to operate on conservation land in perpetuity. Further, section 17Y of the Conservation Act 1987 is clear that concession rents, fees or royalties can be fixed at market value. That raises the question: If concessionaires are unhappy with the terms being offered, why does DOC not simply open the opportunity up to wider competition?

When to consider competitive allocation of concession opportunities

The consultation document contains mixed messages regarding competitive allocation.

On the one hand, it includes a proposal to change the reference to "market value" in Section 17Y of the Conservation Act to a "fair return to the Crown", the rationale being that "setting a fee according to market value is difficult, drawn out, and typically does not allow the Crown to get the full value expected from a concession opportunity".

Establishing the market value of a particular commercial opportunity is of course one of the main benefits of competitive processes, like tenders or auctions. In that light, it is surprising that the consultation document also seeks feedback on when these sorts of processes should be used to award concessions.

As discussed in my report *Not 100% – but four steps closer to sustainable tourism*, I think there are good reasons for making greater use of competitive processes to allocate concessions.

For one, it would ensure that the Crown – on behalf of all New Zealanders – captures a larger share of the rents generated by commercial activity on public conservation land. The reality is that there is significant economic value associated with the exclusive (or near exclusive) right to operate in places that are often spectacular, even by global standards. Allocating such opportunities via a tender or auction process is the most straightforward way of establishing what that value is.

It would also ensure that all tourism businesses have potential access to these opportunities. This is not necessarily the case with the existing "first-in first-served" approach to concessions allocation. Incumbent operators tend to be favoured when concessions are renewed, whereas newer, potentially more innovative firms are more likely to be frozen out.

With that said, I do not support the competitive allocation of concessions everywhere and always. There is probably little to be gained by using tenders to grant concessions for activities that are uncommon or 'one off' in nature (e.g. filming or photography) – the administrative costs of doing so would quickly become excessive. Rather, the primary focus should be on those classes of activity and locations where demand for concessions is approaching – or exceeds – their supply (i.e. the activity limits contained in DOC's various management strategies or plans).

As mentioned above, there may also be a case for competitive allocation in situations where there is disagreement about the appropriate activity fee. Operators who do not accept the fee proposed by DOC should be open to the possibility of competing for the opportunity in a public tender or auction.

Recommendation:

- DOC should make greater use of competitive allocation to ensure that concessionaires pay a fair market price in return for the right to operate on public conservation lands and waters.

How might competitive allocation work in practice?

Where concessions are to be allocated via a competitive process, the consultation document envisages using a set of attributes to do so. They include performance, returns to conservation, offerings to visitors, benefits to the local area, and the recognition of Treaty rights and interests.

This sort of 'weighted-attribute' approach is used widely in the public sector and is a reasonable way forward.[2] It would, however, require DOC to decide on the relative importance of each attribute, something which immediately raises a set of potentially challenging questions. Given DOC's role as custodian of New Zealand's public conservation lands and waters, to what extent should environmental performance be traded off against financial returns to the Crown? Given DOC's treaty responsibilities under section 4 of the Conservation Act, how should applications from iwi-owned businesses be weighed against past performance?

Given these issues, I think it is worth considering an alternative approach whereby DOC would specify the terms on which the concession is available right up front. This could be done in partnership with specific hapū/iwi, thus providing a form of preference without their ability to veto the decision, as ruled by the Ngāi Tai case. In practice, this sort of approach would mean DOC setting out its minimum expectations for performance, returns to conservation, benefits to the local area and other relevant factors in the tender documents it publishes. Assuming those expectations were met, the concession would be awarded to the operator who proposes the highest activity fee.

This approach would encourage DOC to be far more specific about the environmental terms on which it is allowing commercial activity on public conservation land. It is well within its rights to do that. The Conservation Act is clear that the granting of concessions can only be justified if their exercise is not inconsistent with the conservation of the resources that DOC is responsible for.[3] Further, section 17X allows the Minister of Conservation to "impose such conditions as he or she considers appropriate for the activity … including (but not limited to) conditions relating … the activity itself, the carrying out of the activity, and the places where it may be carried out".

The sorts of conditions that DOC may wish to impose will be site specific and depend very much on the activity in question. But by way of example, consider the noise pollution associated with commercial air transport and sightseeing in places like Milford, Mount Cook, and Franz Josef and Fox Glaciers.

As discussed in my recent report on tourism, DOC has historically required aviation operators working in these areas to hold noise abatement certifications. These require pilots and operators to undertake training and demonstrate an awareness of operational practices that can mitigate noise levels (e.g. operating at higher altitudes or ensuring that operations avoid

2 OAG (2008) notes that this approach "seeks to balance the trade-off between price and quality, and it can be used for goods or services." https://oag.parliament.nz/2008/procurement-guide/docs/procurement-guide.pdf

3 Conservation Act 1987, s 6. See also s 2, for the definition of conservation is "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."

sensitive areas where possible). However, the practices themselves have tended to remain voluntary in nature and a lack of monitoring makes it difficult to assess how widely they have been adopted.

DOC could be far more demanding. Significantly reducing aviation noise in the most popular parts of the conservation estate might mean limiting operations to particular times or days. It might also mean requiring the more widespread adoption of noise reducing technologies. Clearly, these sorts of conditions would create new costs for tourism operators. While that would no doubt be unpopular, it would be entirely consistent with the idea that businesses allowed the privilege of using public conservation lands and waters for commercial gain should do all they can to protect them from degradation.

Recommendation:

- When using competitive allocation, DOC should specify the environmental terms and conditions on which the concession is available at the outset, rather than allowing them to be balanced against other criteria.

Proposed changes to the framework for exchanging and disposing of public conservation land

Introduction

This proposal would represent a major change to New Zealand conservation law. Were it to go ahead, it would make around 5 million hectares of public conservation land – almost two thirds of the conservation estate – available for exchange and disposal. Many different types of conservation land would potentially be affected. Everything from local reserves covering one hundred hectares to conservation parks covering one hundred thousand hectares. The vast majority of this land is of high ecological value.

For a proposal with such wide-reaching consequences, it is striking how vague the consultation document is about what the Government is trying to achieve. A variety of ideas appear throughout the document:

- "Ensuring conservation land is managed and looked after properly."
- "Although not impossible, current limitations mean it is hard to exchange or dispose of PCL for strategic conservation priorities."
- "Land exchange settings could be adjusted to support other government priorities while providing a net conservation benefit and safeguarding vulnerable biodiversity."
- "Land disposal settings could also be adjusted to support cases where they can support positive conservation outcomes."

In my reading, there seem to be at least two distinct objectives wrapped up in these ideas.

One is that making it easier to exchange public conservation land will create opportunities for DOC to acquire and protect remaining areas of privately owned and ecologically valuable land (without the need for additional public funding). If that is indeed the intent, then I would offer my in-principle support. Critically though, that support rests entirely on the inclusion of a robust net benefit test.

The consultation document has little to say about what this test might look like. It is silent on how net benefit might be defined in practice. It is also silent on who would be responsible for evaluating the existence (or not) of a net benefit, and whether that determination would be binding on ministerial decision making. Nothing is said about whether exchanges could be facilitated by cash or whether they would be land only. And if cash was to be included, it is unclear to what purpose it could ultimately be put.

These design considerations will be absolutely central to the success of any future land exchange regime. If poorly conceived, there is a real risk that high-value public conservation land will be traded away for little or no corresponding long-term benefit. For that reason, I have set out what I see as the key requirements under three headings below: the need for a precautionary approach, how net benefit should be defined and evaluated, and who should ultimately be responsible for the final decision.

The other possible objective wrapped up in these proposals is to improve the long-term fiscal sustainability of the Department of Conservation's work by reducing the amount of land it is responsible for. I note, in particular, the references in the consultation document to "support[ing] other government priorities" and the "small parts of PCL where the costs of maintenance and/or compliance (e.g. fire risk) draw resources away from better investments".

I can support the disposal of public conservation land where it has no or very low conservation value (the current test in the Conservation General Policy). Some stewardship land is probably relevant in this context. As discussed further below, my view is that the Government should get on with the process of reclassifying this land as soon as possible.

But limited conservation value is a very different test to the one proposed in the consultation document "that disposals would be restricted to situations where land is surplus to conservation needs". The mere fact that DOC – the agency entrusted to "manage for conservation purposes" all Crown-owned conservation land[4] – seems to believe there are "situations" where New Zealand has a surplus of it is striking. Again though, the consultation document is silent on where this might be the case. It is certainly true that some of New Zealand's pre-human ecosystems have survived more intact than others. But the idea that we are protecting 'too much' of certain ecosystems is not one I have heard before.

I am well aware of the resource constraints that the Department faces in trying to undertake conservation work across what are very large parts of New Zealand. But I do not believe that rationalising the size of the estate will provide anything other than temporary relief from a budget process that will always be subject to competing demands for limited resources. In my view, DOC should continue doing what it is already doing: rigorously prioritising how and where its funding is best deployed and, where possible, working with private, philanthropic and non-governmental interests to further advance conservation outcomes on the land it is responsible for.

Recommendation:

- Disposal of public conservation land should only be considered where it has no or very low conservation value.

4 Conservation Act s 6(a).

Comparing conservation values is difficult – a precautionary approach is needed for land exchanges

Establishing the conservation value of two discrete parcels of land – and therefore whether a net benefit can be created by exchanging them – is not a precise science. It is made particularly difficult by:

- the need to account for the multiple sources of value provided by conservation land: intrinsic and cultural value, 'downstream' ecosystem services, recreational benefits
- the need to compare fundamentally different types of ecosystems. As the consultation document rightly points out, much of the value to be gained from enabling land exchanges results from the opportunity to acquire and protect highly threatened or poorly represented ecosystems
- the need to account for regional differences in the availability of public conservation land. As discussed above, people living in some parts of New Zealand have ready access to numerous parks and reserves. People in other areas may have to travel a significant distance. It follows that additions to the network in some places may be worth more than additions elsewhere
- The impossibility of replacing or exchanging culturally significant areas with areas outside of the range that relevant hapū/iwi whakapapa to.

These factors introduce significant subjectivity and uncertainty into the evaluation process. What future outcome should be assumed for a privately owned but currently unprotected area of rare lowland swamp forest? How should the conservation value of that forest be assessed relative to an extensive area of nearby beech forest?

Given what is at stake, I think these issues necessitate the inclusion of a significant 'margin of safety' in the assessment process.

How this is specified depends on the methodology used to value the land in question. If an economic approach is used, then it is possible to envisage some sort of quantitative test, i.e. the conservation value of the land to be acquired (plus any money) must exceed that of the land to be disposed of by at least xx per cent. If the evaluation is more 'eco-centric' (i.e. where the biophysical conservation values of the land are compared by ecologists – à la Ruataniwha), then the margin of safety could involve a requirement that the net benefit is clear and obvious.

In addition to a margin of safety, serious consideration should be given to including an additional layer of scrutiny in the process, perhaps via an independent review of the initial assessment. As discussed further below, the Conservation Authority could be well placed to do that.

The subjectivity and uncertainty inherent in evaluating the conservation value of different land parcels also justifies the use of bottom lines. Here, I strongly support the suggestion in the consultation document to exclude New Zealand's most valuable conservation land from the proposal.

The key questions are how such a bottom line should be specified and where it should be located. As things stand, the consultation document proposes exclusions based on the classifications under which public conservation land is currently held. National parks, wilderness areas, sanctuary areas, ecological areas, national reserves, nature reserves and

scientific reserves – about a third of public conservation land in total – are thereby deemed too valuable to be available for exchange.

That is a straightforward and pragmatic approach to trying to ringfence New Zealand's most valuable conservation land. That said, it also relies heavily on these classifications being a fair reflection of the conservation value of the underlying land. That is not always the case. The conservation land classifications we observe today are not the product of some comprehensive historic assessment. Rather, they reflect decisions made by different people, at different points in time, often with idiosyncratic factors in mind.

Decisions about the status of land in the Mohikinui catchment on the West Coast provide a useful example. In the late 1980s, it was proposed that the North-West Nelson Forest Park be investigated for redesignation as a national park. The land within the Nelson Conservancy was investigated and successfully reclassified as Kahurangi National Park in the mid-1990s. The adjacent Mokihinui catchment in the West Coast Conservancy was investigated at the same time. It was found to be worthy of national park status, with an unmodified wild and scenic river forested from the ridgeline almost to the coast and an exceptional amount of biodiversity, including some rare and endangered species.

However, immediate designation of the Mokihinui was contentious, given that the Paparoa National Park had just been created and a reclassification study of West Coast Forest Accord lands was ongoing. As such, reclassification was parked, and the Mokihinui remained as "yet un-reclassified" land held in stewardship by DOC (i.e. stewardship land). A proposed land swap to facilitate the building of a dam on the Mokihinui River led to a public outcry and the eventual addition of the whole catchment to the Kahurangi National Park.[5]

With these sorts of issues in mind, I think it is worth considering alternative ways of specifying where bottom lines should be located for the purposes of land exchanges. Historic statutory intent provides one way forward.

Both the National Parks Act 1980 and Conservation Act 1987 were enacted with explicit provisions barring the exchange or disposal of the land held under them.[6] In contrast, both the Reserves Act 1977 and those parts of Conservation Act relating to stewardship land have a long tradition of allowing for the exchange of land.[7] The additional protection provided by the National Parks Act and (non-stewardship) parts of the Conservation Act is very likely to have been something that decision makers took into account when deciding what classification to give to public conservation land. In my view, that is something that deserves recognition in the context of the land exchange proposals currently being considered.

Recommendation:

- A precautionary approach should be applied to land exchanges by requiring the inclusion of a margin of error, bottom lines and an additional layer of scrutiny.
- Consideration should be given to excluding a much broader range of conservation land (e.g. non-stewardship land held under the Conservation Act) from being eligible for exchange.

5 The Tararua Ranges provide another example. In the 1940s and 1950s there was a push for regional 'national parks', with the intention to provide readily accessible outdoor recreation for locals and a regional tourism drawcard. The main contender in the Wellington region was the Tararua Range, however this was a state forest and an important source of timber for the rapidly growing Wellington region. A compromise was reached in 1954 with the formation of New Zealand's first forest park. The Tararua Forest Park would serve as a quasi-national park, where recreation was permitted in certain areas, subject to Forest Service restrictions (e.g. closing areas when logging was occurring).

6 National Parks Act 1980 (1980 No 66); Conservation Act 1987 (1987 No 65). The National Parks Act does provide for disposal by Act of Parliament.

7 The Reserves Act since enactment (Reserves Act 1977 (1977 No 66) and the Conservation Act since 1990.

How net benefit is defined – and what is in scope – will be critical

Defining net benefit

The consultation document uses the phrase "net conservation benefit". It also talks about "net conservation benefit to the conservation estate". Other legislation enabling conservation land to be exchanged uses different language. For example, both the Conservation Act and Fast Track Consenting Act use the formulation "enhance the conservation values of land managed by the Department".

These differences may seem semantic, but how net benefit is defined will have a big influence on the sorts of outcomes that might result from allowing a broader variety of public conservation land to be exchanged for parcels of private land.

As the Conservation Authority has noted previously, particular consideration needs to be given to whether the net benefit test should relate to public conservation land or to conservation land more generally.[8]

A not insignificant proportion of New Zealand's ecologically significant land is privately owned. Much of this land enjoys some form of legal protection by QE II covenant, other covenant, or the rules in regional or district plans (relating to SNAs for example). Exchanging public conservation land for this sort of already protected private land could very well meet a 'net benefit for public conservation land' test. But it could also reduce the total quantity of protected land in New Zealand, and thereby fail a 'net benefit for **all** conservation land' test.

A (currently live) land exchange proposal at Belmont Quarry provides a useful example. There, the quarry operator proposes to exchange 16 hectares of QEII covenanted privately owned land (together with 15 hectares of unprotected land that has been used as a cleanfill) for 29 hectares of Belmont Regional Park.[9] This proposal is being considered under the Fast Track Approvals Act, which includes a 'net benefit for public conservation land' test.[10] Whether it will meet that test is uncertain – much will depend on the ecosystem values of the various parcels of land involved. Whether it would meet a 'net benefit for all conservation land' test seems much less likely given that half of the private land proposed for exchange is already protected in perpetuity and the remainder will probably require some remediation to restore ecological value.

Recommendation:

- The net benefit test for land exchanges should relate to all land protected for conservation purposes in New Zealand – not just public conservation land.

8 Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges, Report from the NZCA, 2018. https://www.doc.govt.nz/globalassets/documents/getting-involved/nz-conservation-authority-and-boards/nz-conservation-authority/2018-nzca-report-to-moc-re-stewardship-land.pdf.

9 Winstone Aggregates seeks Belmont Regional Park land through Fast-track Approvals Act | RNZ News

10 See Schedule 6, Part 2, section 29(2).

Land swaps only? Or land and money?

Situations will almost inevitably arise where the conservation value of the parcels of land being proposed for exchange are not well matched. That raises a question as to whether potential exchanges should be facilitated by the inclusion of money. As noted above, the consultation document is silent on whether this is the Government's intention or not.

The inclusion of money in a land exchange could make it easier for a net benefit test to be met in two ways. First, it could be used to create a fund dedicated to the future acquisition of high value conservation land when and where opportunities arise. Second, it could be used to fund conservation work that would, over time, enhance the value of land protected for conservation purposes.

Both approaches have precedent.

The exchange of stewardship land provided for in the Conservation Act may be accompanied by money in order to create "an equality of exchange". The Act specifies that any money so received "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." [11]

The exchange of a wide variety of public conservation land enabled by the Fast Track Approvals Act may also be accompanied by money. In this Act however, money may only be used to fund "improvements to the land acquired by the Crown that were necessary to satisfy the panel ... that the land exchange would enhance the conservation values of land managed by the Department of Conservation". [12]

The main advantage of allowing exchanges of conservation land to be accompanied by money is the flexibility it offers. The conservation value of the land parcels being exchanged does not need to be well-matched (albeit in favour of the Crown – see the 'margin of safety' discussion above), and so more transactions should occur than would otherwise. Over time, the development of a land acquisition fund would also provide DOC with the means to acquire high value conservation land where no obvious exchange opportunity existed.

There are three disadvantages.

The first is the need to value the respective parcels of land (in order to establish the balance of money required). Relying solely on market values is inappropriate here because these do not capture the many non-market benefits that flow from conservation land. Rather the individual ecosystem services provided by the land parcels in question need to be valued, something that is far from straightforward. This is unnecessary in straight land for land swaps. Ecologists either agree that the conservation value of the land to be acquired by DOC exceeds the land to be disposed of, or they don't.

The second disadvantage is uncertainty. In straight land for land swaps, a net conservation benefit should be almost guaranteed. That is not necessarily the case when the net benefit rests on the future application of funds transferred to DOC. If funds are ringfenced for conservation work, there will be uncertainty about efficacy – will the weed or pest management programme be as effective as expected, and what is the longevity of any gains? Where funds are ringfenced for the future acquisition of high value conservation land, there is uncertainty about future land prices. How much money should DOC require now to ensure it can acquire a yet to be determined parcel of land at some unknown future date?

11 Conservation Act s 16A(4).
12 Fast-track Approvals Act 2024, Schedule 6, cl 34.

The third disadvantage is the possibility that land exchanges become dominated by cash and, in doing so, come to resemble land disposals. Consider a transaction involving 1,000 hectares of public conservation land for 1 hectare of private land and cash, for example.

On balance – and it is a fine call – I think that allowing land exchanges to be accompanied by money is justified by the flexibility it would provide DOC. In my view though, the ratio of cash to land should be limited to a small proportion of the value of the overall transaction (perhaps 10 or 20 per cent). If the proportion were higher than this, then it would be important to increase the 'margin of error' discussed above.

Furthermore, I think the proceeds should only be available for future land acquisition, or to restore the conservation value of the land acquired. Operationally this would require the ringfencing of any money associated with a land exchange.

Using any funds from a land transfer for wider conservation operations is problematic. This is partly because there is a fundamental mismatch in the longevity of outcomes. Disposing of public conservation land is a decision that will be felt in perpetuity. Whether the same can be said for weed or predator control funded by a fixed pot of money seems doubtful. Just as importantly, using revenues from the sale of Crown-owned assets to fund ongoing operational work is not a particularly sustainable approach in the long-term. It certainly isn't one that is consistent with well-established public finance principles.

Public finance distinguishes between capital and operational expenditure. Capital expenditure is an investment in an asset that creates a stream of future returns, while operational expenditure provides more immediate benefits. Generally public finance principles discourage funding operational expenditure by selling assets. In DOC terms, an activity like controlling pests or weeds would be seen as current expenditure, although eradication of pests and weeds could count as capital expenditure as it removes the need for future operational expenditure on control.

Economists aim to equivalise between operational and capital expenditure using a discount rate, but I believe this is inappropriate in this circumstance. Conservation land is a lasting legacy and there should be safeguards against reducing the value of that land over the long term. We simply shouldn't flog the family silver to pay for our normal current expenses. This reasoning also applies to my concern above about exchanging land for cash – there needs to be safeguards that cash will be used to maintain the overall value of conservation land.

Recommendation:

- Land exchanges should be able to be facilitated by the inclusion of money, but the ratio of cash to land should be limited to a small fraction of the overall value of the transaction. Furthermore, any money should be ringfenced for two specific purposes: future land acquisitions and any permanent improvements required to immediately raise the conservation value of the land received in a swap.

Net benefit when?

Any evaluation of net benefit will almost inevitably prompt the question: When must that benefit be realised? The temporal aspect of land swaps is complex and has not been discussed in the consultation document. Depending on how it is treated, the result of any net benefit evaluation could throw up very different results. Consider, for instance, how the future fate of the land that is exchanged could be treated. Either:

- the estimate of net benefit could be raised by considering the future ecological state of the land gained due to improved management by DOC; or
- the estimate of net benefit could be reduced by considering the future ecological state of the land traded due to it being mined.

If temporal considerations are included in calculating net benefit, then there would need to be an estimate of the likelihood of the outcomes. Looking at the two examples above, the second outcome seems far more likely than the first.

The Conservation Authority commented on these matters in its 2018 advice.[13] It supported the idea of taking potential future conservation values into account as part of any assessment. But it also acknowledged the subjectivity of doing so – "assessing what are the likely future conservation values of the land concerned will require a subjective assessment based on the available evidence".

In my view, the consultation document should have canvassed this issue and its omission significantly compromises my ability to provide a comprehensive response.

Process: Who decides and how

The land exchanges proposed in the consultation document will ultimately require an evaluation as to whether a net benefit exists. Who should do that, using which methodology and subject to what criteria, remain open questions.

In my view, DOC is well-placed to undertake the net benefit evaluation as it has done in the past.[14] That evaluation should be conducted in consultation with hapū. However, given the quality of much of the public conservation land that would become eligible for exchange and the subjectivity and uncertainty inherent in determining whether a net benefit exists, I strongly suggest that DOC's evaluation should be subject to an independent review by the Conservation Authority. Both parties should agree that a clear and obvious net benefit exists for the proposed land exchange to go ahead.

Consideration also needs to be given to whether the result of the net benefit assessment would be binding on Ministerial decision making, or just something that Ministers must have regard to. Under the current regime, the relevant tests are binding: the public conservation land considered in the consultation document either cannot be exchanged of disposed of (i.e. non-stewardship land held under the Conservation Act), or only if it has "no, or very low, conservation values" (i.e. that held under the Reserves Act). In my view, any future net benefit test should be binding in exactly the same way.

13 Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges, Report from the NZCA, 2018.

14 For example, in the Ruataniwha case. See https://www.doc.govt.nz/globalassets/documents/getting-involved/consultations/2014/ruataniwha-report.pdf.

How net benefit should be evaluated also requires consideration. As mentioned above, two approaches are available. One is eco-centric and evolves comparing the two parcels of land on the basis of their biophysical conservation values – things like rarity, representativeness, natural functioning or integrity, the presence of rare species, or the spatial relationship to other tracts of nearby conservation land. The other is more economic in nature. It involves conceptualising the land in question as assets that deliver a steady flow of ecosystem services. By monetising those services and discounting them back to the present day, the conservation value of the respective parcels of land can be compared.

I would suggest a hybrid approach. Historically these judgements have been made by ecologists without the complications of monetisation and discounting. This consultation seems to be envisioning a similar way forward. However, that method doesn't work well when money is involved, or when the ecosystems in question are completely different.

This is where a valuation of ecosystem services could be used to support the decision. Economists have developed generic values for different types of ecosystems. These values would benefit from more investment to customise them to New Zealand conditions, as I have called for in previous reports. The valuation of ecosystem services could then be augmented by an ecological assessment of the value of those ecosystem services in that particular location. For example, this could place the ecosystem service at a proportion of the pristine state – including even over 100% if the site is of exceptional value. Some guidance would need to be developed around this grading system.

The key point to make is that there is no perfect way to do this. Clinging to a single methodology as if it were delivering 'the truth' will lead to disappointment in difficult cases. The best we can do is show that the evaluation of comparative benefits has been tested in the round to the best of our ability. A hybrid approach has the best chance of delivering confidence in the process.

Recommendation:

- Land exchange evaluations should be subject to an independent review – perhaps by the Conservation Authority.
- The net benefit test should be binding, not subject to Ministerial discretion. Approval of the swap would still sit with the Minister.
- The traditional eco-centric approach to evaluating the conservation value of two parcels of land should be supplemented with an economic valuation of ecosystem services.

Treatment of stewardship land

My concluding comment relates to stewardship land. There has long been a resistance to reclassify this, in part due to the fact that once reclassified, it would be subject to a much higher test in terms of land swaps or transfers. This change would end that problem.

I must emphasise that – despite the comments of certain Ministers – stewardship land is not necessarily low value land. A recent review of West Coast stewardship land concluded that most of it has conservation value, much of it sufficient for national park or scenic reserve status.[15]

15 Stewardship Land: A Note for the Prime Minister, 2025. https://eds.org.nz/wp-content/uploads/2025/02/EDS-Stewardship-Document_DRAFTv1.pdf

If the land exchange proposals in the consultation document are implemented, stewardship land should be reclassified with haste. A target date should be set to reclassify all land. In my view, this idea should be incorporated into the current set of proposals.

Recommendation:

- As part of these proposals, the Minister of Conservation should set a target date for the classification of stewardship land.

Rt Hon Simon Upton

Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata