

Philip Woollaston

# Origins of the Legislation and Policy Relating to Minerals in Conservation Areas

On 4 September 1990 I introduced into Parliament the Protected Areas (Prohibition on Mining) Bill – sometimes referred to as PAPOM. It was a government bill, introduced in my role as minister of conservation. The genesis of the bill was long and tortuous, though by no means as long as the seven years it took for parts of it to find their way into the statute book as the Crown Minerals Amendment Act No 2 1997.

The growing awareness in the 1960s and 1970s that natural resources are not infinite and the environment not infinitely robust led to the increased political strength of the environmental movement in New Zealand, through campaigns such as Save Manapouri in the 1960s and the Native Forest Action Council beech forest

campaign of the 70s. In the first half of the 1980s the Muldoon government's vaunted 'Think Big' policies led to further polarisation over massive projects such as the Clyde Dam. The failure of 'Think Big' and the election of a reforming Labour government in 1984 led to an effective liberation of the environmental movement. That is not to say that the fourth Labour government was a 'green' government. It was not. The internal disagreements over environmental issues and policies were as pronounced as the more notorious divisions over economic

policy, with the 'green' members in a significant minority.

That the snap election of July 1984 caught both the Labour Party and the electorate unprepared was fortunate for Labour, which was able to claim a mandate to 'change things' without the baggage of too much policy detail. It was also helpful to the minority in the caucus who saw environmental and resource management policy as having the same sort of significance as economic policy.

Following the 1984 election an uneasy alliance emerged between the economic

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reformers in the Labour caucus (the 'Rogernomes') and its greener members, both having as short-term goals the abolition of damaging mechanisms such as SMPs (supplementary minimum prices),<sup>1</sup> fertiliser subsidies and suspensory loans for land development,

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as well as the dismantling or weakening of the powerful construction arms of government: the Ministry of Works, Forest Service, Ministry of Energy, Department of Lands and Survey, Mines Department, etc. For the Rogernomes the objective was privatisation of their quasi-commercial operations, and for the environmentalists it was to join up the 'green dots' and create both a viable conservation agency and the mechanism for better and more transparent assessment of environmental costs and benefits of resource use proposals within government at all levels.

Much has been written about the changes to the machinery of government undertaken during that government's first term and I won't traverse the same ground, other than to say that the uneasy alliance was over by early 1987 with the establishment of the state-owned enterprises, Department of Conservation (DOC) and Ministry for the Environment. Attention was now focused on divisive issues such as the allocation of the remaining indigenous forests and high country land either to conservation or to private production, the creation of property rights in fish stocks, and, of course, the treatment of mining applications on Crown-owned land.

The classification of land which was allocated to DOC was a major and time-consuming exercise involving considerable research and fieldwork. To complete it was clearly going to take many years. The land which was not national park or already classified under the Reserves Act, the Forests Act

or the Wildlife Act became 'stewardship land' – a statutory holding pen – until it could be assessed and, if merited, given more precise statutory protection. This process was further complicated by the different – and sometimes overlapping – classifications inherited from different

departments operating under different statutes which reflected different periods of our history. In October 1987 Helen Clark (then minister of conservation) told Parliament:

There are plans for extensive reviews of conservation legislation within the next 3 years. A high priority will be a review of the legislation governing the different kinds of reserves. At present, 11 Acts of Parliament govern the protected areas and 36 different kinds of protected area are provided for.

She went on to say: 'It will be a major operation.'<sup>2</sup>

The objective was a bill to be called the Protected Areas Bill, which would cover all protected areas within the jurisdiction of DOC. Just over a month later Fran Wilde, associate minister of conservation, outlined the proposed timetable:

It is intended that the discussion document will be published in mid-1988, with proposals for legislative change to be before the Government in late 1988 or early 1989. It is expected that new legislation or amendments to existing legislation will go before the House in mid-1989 to late 1989.<sup>3</sup>

The timetable was ambitious. DOC was struggling with limited resources to establish itself from the fragments of a number of departments, and the government, preoccupied with major social and economic reforms on a number of other fronts, did not see reserve classification as a priority. A discussion document was released in

1988 and over 300 submissions received, but by January 1989 when I succeeded Helen Clark as minister of conservation progress was slow. Nevertheless, I was still hopeful, telling Parliament in September 1989 that:

the 20 different categories of protected area administered under 4 Acts of Parliament will be reduced to 5 categories in the proposed legislation: conservation park, reserve, sanctuary, wilderness area, and local purpose area. However, the present National Parks Act will remain intact, and will not be included in the proposed legislation.<sup>4</sup>

The reference to national parks is worth noting. Public submissions and other feedback had made it clear that any government that altered the special status given to New Zealand's national parks would do so at its peril. Recent reaction to the proposal to remove the 'schedule 4' protection from parts of some national parks suggests that the same sentiment is alive and well some 23 years later.

While all this was going on the public debate over mining in protected areas continued to grow. The issue was not new. A number of licenses for mining activity in ecological areas, consented to by the minister of forests prior to 1 April 1987, were contentious and more applications were being received. Not surprisingly, government departments held similar views to their client groups in the NGO and industrial sectors, with DOC advising its minister in June 1988 that after 1 April 1987 the Ministry of Energy 'saw significant changes in the land management priorities contained in the Conservation Act and no longer was prepared to trust the department to act reasonably in monitoring the conditions'.

The upshot of this disagreement was a Crown Law opinion, interpreted by the Department of Conservation as stating that DOC had no role at all in either monitoring or exercising discretion over consents for mining on conservation land which were issued prior to 1 April 1987, despite being required to manage the land. Moreover, they also concluded that some conditions applied since that

date were *ultra vires* and could not be enforced.

There was no disputing DOC's conclusion that legislative amendment was urgently needed. Part of the immediate problem – monitoring and control of the pre-existing leases – was eventually dealt with in section 34 of the Conservation Law Reform Act 1990, which was introduced to Parliament in August 1989. This act was the second part of the conservation legislation trifecta and dealt with the management of conservation resources while simplifying the complex web of advisory boards, etc, left by the precursor legislation. The rationalisation of the classifications of protected areas under the DOC's aegis – the proposed Protected Areas Bill – was to be Part 3.

However, the thorny issue of new mining applications over the conservation estate remained.

It might seem a logical assumption that the vesting of the conservation estate in the DOC would mean that the Conservation Act, with its protective philosophy, would hold sway and the minister's consent would be given or withheld accordingly. Unfortunately, that was not the legal reality. The minister of conservation's ability to consent, to impose conditions or to withhold consent for mining activities flowed from the Mining Act 1971 and was governed by it, not the Conservation Act. Some clarity might be gained by the issue of a policy document on the subject, and in late 1987 Helen Clark stated that she was 'working on a draft document that will outline guidelines by which I will determine whether to consent or not to consent to mining licence applications in conservation areas'.<sup>5</sup> However, the policy and guidelines would still have to conform to the Mining Act.

That point was not lost on seasoned campaigners such as the Maruia Society's Gwenny Davis and Guy Salmon, who obviously realised that, however good the guidelines, case-by-case decisions under the Mining Act would not achieve their goal. In November 1988 the society's Maruia Declaration was presented as a petition to Parliament, with over 154,000 signatures. It sought, *inter alia*, 'the closure to mining of national parks,

reserves, and specially protected areas' and subsequently received a favourable recommendation from the Planning and Development Select Committee.<sup>6</sup>

The release of Helen Clark's discussion paper on guidelines and the active lobbying of environmental groups were accompanied by a corresponding increase in publicity and lobbying from the mineral industry, particularly the

protected areas proposed in 1987 has not subsequently taken place. While there has been some alignment of the Reserves Act and the Conservation Act, there are both overlaps and confusing differences between them and the Reserves Act struggles to deal with the national taonga of our nature and scientific reserves in the same legislative breath as local domains and gravel pits. Whether because of that

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Mining and Exploration Association. There was also a flurry of applications for mineral exploration in protected areas. In July 1989 DOC reported to the minister of conservation that there were current applications in respect of ecological areas in Westland, north-west Nelson and western Southland, with a need to determine '20-odd' applications. DOC's advice went on to raise the 'more strategic' question of whether such sensitive land should be open to prospecting, and by implication subsequently to mining, at all.

I am not sure at what point the 'strategic question' – already asked and answered by the Maruia Declaration and a select committee of Parliament – became a legislative proposal, but it was my desire to entrench as far as possible the protection from mining and prospecting of the most sensitive areas in the Protected Areas Bill. Quite apart from any personal views I had on the mining of those areas, it was obvious that the piecemeal consideration of applications (and in some cases subsequent litigation) was divisive, expensive for mining proponents and opponents alike, and was diverting scarce resources within the department from the work it had been set up to do.

However, by the start of 1990 I had to accept that the Protected Areas Bill, requiring lengthy and complex drafting, was not going to make it onto that year's legislative programme. As an aside, I think it a pity that the rationalisation of

or for other reasons, there does not appear to be an accessible and authoritative database of protected areas and their classifications, which I find surprising.

At the same time as the logical vehicle for greater protection of the most sensitive areas was stalling by the roadside, the controversy over applications for mineral activity in ecological areas and over other sensitive conservation land was intensifying. DOC's hands – and mine – were to an extent bound by the Mining Act presumption that Crown land was open for mining and the requirement that each application be considered under that act. A DOC proposal that the minister of energy close 60,000 hectares of the Northwest Nelson Forest Park (destined to become part of the Kahurangi National Park) to mining activities was opposed by the Ministry of Commerce and remained stalled on the minister of energy's desk. The environmental groups, sensing an imminent change of government, were becoming more agitated.

On 29 March 1990 I managed to secure space in the legislative programme for a smaller and less complex Protected Areas (Prohibition on Mining) Bill. The intention was quite clear: to prohibit mining (including prospecting) in all national parks, plus national reserves, nature reserves and scientific reserves under the Reserves Act and all wilderness areas, sanctuary areas and ecological areas under the Conservation Act.<sup>7</sup>

The bill also extended a similar protection to Antarctica (a policy

announced in the 1989 white paper on Antarctica). This provision later became, in amended form, Part 2 of the Antarctica (Environmental Protection) Act 1994.

A significant feature was that the bill allowed (in clause 3) the extension of the same protection to other areas of conservation land (but not land outside the conservation estate) by order-in-council, on the joint recommendation of the ministers of conservation and energy. There were thus two possible paths to the protection of land not already in one of the above categories: either a specific decision of the two ministers that a particular piece of land should become a 'protected area', a decision which would certainly be taken only after consideration of advice from both the Department of Conservation and the Ministry of Commerce but which did not require public consultation; or by having the land gazetted as belonging to one of the protected categories – a much lengthier process, subject to public consultation with statutory rights of submission and objection. My recollection is that the 'fast track' procedure was seen as an emergency measure which would be rarely used. A possible example might be to protect the special values of land being investigated for national park status – a process lasting years rather than months – if a mining proposal seemed imminent.

This meant that the PAPOM regime made it easier to add further protected areas than to remove the protection, as the bill contained no means of exempting land in one of the listed categories and no mechanism for revoking a declaration made under clause 3. To do either of these things would have required an act of Parliament. The only other way to undo the effect of the bill would have been to change the status of a particular piece of land so that it no longer fell into a protected category. In the case of national parks and national reserves, that would also require an act of Parliament.<sup>8</sup> For wilderness, sanctuary and ecological areas, gazettal can only be revoked after the same degree of public consultation as that required to create them.<sup>9</sup> In the case of nature reserves and scientific reserves public consultation is also required,<sup>10</sup> and even then the minister's powers of

revocation are limited.<sup>11</sup> It was certainly intended that the protection should be permanent, other than in the unusual circumstance that the values for which an area of land had been specially protected had ceased to exist to such an extent that it no longer belonged in that category. This contrasts with the comparative ease with which the ministers of energy and conservation can amend the 4th schedule of the Crown Minerals Act (CMA).<sup>12</sup>

It has been widely assumed that requiring an act of Parliament to revoke national park or national reserve status gives a greater degree of protection than is accorded the other 4th-schedule categories. A high degree of protection was clearly the original intention, contrasted with the simple gazette notice that might once have been the alternative. However, the speed and visibility of legislation is largely in the hands of the government of the day and whether it is in fact stronger than the extensive public consultation now required by the Conservation Act<sup>13</sup> is a moot point. However, there are significant differences between the Conservation Act definition of consultation and that in the Crown Minerals Act.<sup>14</sup>

In particular, the vague language and the limitations placed on the requirement to consult in section 61(5) of the CMA contrast starkly with the requirements of section 49 of the Conservation Act. Another strange feature is the provision in section 61(6) that no ecological area can be added to the schedule unless the minister of energy and the minister of conservation have reassessed the particular scientific value for which the land is held and also assessed the value of any Crown minerals in the land. That provision not only requires them to second-guess the scientific assessment that led to the area being gazetted, it also seems to suggest that the land should be prospected for minerals in order to decide whether it should be closed to prospecting!

The ecological areas, which were at the focal point of the issue more than two decades ago, seem to be the biggest losers in the transition from the PAPOM Bill to the 4th schedule of the CMA. Their category has been removed from the protective regime, and only

two ecological areas – Parakowhai (or Parakawai) and Otahu – are named in the schedule. (The Ministry of Economic Development recently commissioned a section 61 report on the Parakowhai Ecological Area, presumably with a view to its possible removal.) I think I understand the horse trading that led to the absolute prohibition of any of the 34 ecological areas named in the 4th schedule of the Conservation Act being protected under the CMA 4th schedule – presumably pursuant to the West Coast Accord – but there are another 77 (by DOC's count) missing from any list. Fifty of them are in the North Island and 16 in parts of the South Island outside the West Coast.

It is pleasing that some measure of protection from mining activities is accorded most of the areas contemplated in the PAPOM Bill (and here I should pay a tribute to the three women principally responsible for resurrecting it: Judith Tizard, Christine Fletcher and Jeanette Fitzsimons – MPs from three different parties, a nice example of MMP in action), but the protection under the CMA 4th schedule is undeniably weaker than I had envisaged. I think there is plenty of evidence that the protection in the PAPOM Bill is still needed, ideally accompanied by the unified protected areas legislation proposed in 1987. In the meantime, a public register of protected areas and their classifications would be a useful start.

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- 1 The supplementary minimum price scheme under which export prices of wool and meat were guaranteed operated from 1975 to 1985. See, for example, Griffin G.R. and T.P. Grundy (1988) *The Supplementary Minimum Price Scheme: a retrospective analysis*, Christchurch: AERU, Lincoln College.
  - 2 *Parliamentary Debates* (Hansard), 7 October 1987.
  - 3 *Ibid.*, 10 November 1987.
  - 4 *Ibid.*, 14 September 1989.
  - 5 *Ibid.*, 24 November 1987.
  - 6 *Ibid.*, 4 October 1988.
  - 7 I announced this intention at the Maruia Society AGM on 1 April. Nature reserves were not included in the proposal at that time but were subsequently added.
  - 8 See National Parks Act 1980, s11(1) and the Reserves Act 1977, s13(2).
  - 9 Conservation Act 1987, s18(8).
  - 10 Reserves and Other Lands Disposal Act 1977, s24(2).
  - 11 *Ibid.*, s24(4).
  - 12 Crown Minerals Act 1999, s61(4).
  - 13 Conservation Act 1987, s49.
  - 14 Crown Minerals Act, s61(5).