

ACCESS TO MINERALS

Controversy over access to minerals is not recent. For example, in 2011 the Supreme Court will hear the *Paki v Attorney General case*,¹ involving Māori claims to continued interests in the bed of the Waikato River. In 1903, under the Coal Mines Amendment Act of that year, the beds of all ‘navigable’ rivers in New Zealand were taken because of a concern at the time about coal being mined under river beds.² That law remains in force under the Crown Minerals Act 1991 (CMA) (section 11(2)). The case arises because there has never been a clear understanding of what ‘navigable’ means.

Here is another example. In 1937 the Crown nationalised petroleum. As late as 2002 it became apparent that there was uncertainty about what that entailed. In 2002 the Ministry of Economic Development wrote to key coal mining interests and advised them that the Crown considered that the 1937 legislation (the Petroleum Act 1937), repeated in the CMA, also covered the methane gas around coal seams (also called coal seam gas).³ As you might imagine, this extends

considerably the land over which rights to access petroleum may be exercised.

The basic issue

The common law holds that ownership of the land is to the centre of the earth. It was apparently a Jewish scholar who first enunciated the idea, which was picked up by the Romans, and by the 16th century was an accepted principle of English common law.⁴

Yet in New Zealand today, for almost all land we have a situation which in the United States is known as a split or severed estate, with the surface of lands

and the minerals in separate ownership, and the minerals in nearly all situations held by the Crown. This division is what makes access such a fraught issue in relation to minerals. As John Luxton put it when the CMA was passed:

The issue of access is another contentious matter. This is a problem of competing property rights – the property right of the surface landowner and the property right of the Crown as owner of the substrata. ... In 1873 the comment was made that there was no doubt that one of the most difficult problems that the House had to solve was the way to dissociate surface rights from mineral rights. So that problem remains. This is not an environmental issue; it is an issue of competing property rights – that is, the right of the Crown to extract minerals for the benefits of taxpayers or the property rights of the surface owners to continue to use the surface of the land.⁵

The split or severed estate came about in three ways:

- Crown claim to ownership of gold and silver
- Crown reservation of minerals from titles issued by it

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- special legislation concerning recently valuable minerals – petroleum and uranium.

Crown claim

In 1568 Thomas Percy, the Earl of Northumberland, was sued by Queen Elizabeth I over mineral rights on the estate granted to him by the Queen. The resulting court decision, the Case of Mines, established the common law principle that the Crown by prerogative right owns all gold and silver. This prerogative right was imported into New Zealand law on the basis that New Zealand was an English settlement, the settlers bringing with them all the laws of England that were 'suitable' to the colony.⁶

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The principle has had an interesting application in New Zealand. When Māori began to demand money from Pākehā miners accessing their lands for gold in Hauraki, the Crown intervened to manage the goldfields and paid Māori for access to their lands, but remained coy about openly asserting the Crown prerogative, because of fears that Māori would forcefully reject the assertion.⁷ The situation might be described as a 'secret severed estate'.

Crown reservation

Beginning with the Land Act 1892, the Crown reserved minerals in alienations of land. Since almost all land in New Zealand originates in a title from the Crown (the Crown being responsible for alienation from Māori), this has meant that practically all minerals are vested in the Crown. Under the CMA, minerals are defined⁸ widely as 'naturally occurring inorganic substance beneath or at the surface of the earth, whether or not under

water; and includes all metallic minerals, non-metallic minerals, fuel minerals, precious stones, industrial rocks and building stones'. It is worth noting that there have been varying definitions in statutes and legal documents of what exactly constitutes a mineral, and that can be important for the interpretation of old Crown grants, to discover what minerals are covered by them and what are not.

Special legislation

The Petroleum Act 1937 nationalised all petroleum to the Crown. The Atomic Energy Act 1945 nationalised uranium. Also, the Iron and Steel Industry Act 1959 vested the right to prospect and mine ironsands in the Crown. Apparently this

occurred because a local steel industry was seen as vital to partly replace New Zealand agricultural exports if they were frozen out of the European Common Market.⁹ This provision had been repealed by the time of the 1991 act.¹⁰

The Petroleum Act 1937 has been the subject of a Waitangi Tribunal report.¹¹ It considered that while petroleum wasn't a special taonga of Māori and enjoying Treaty protection in that sense, the extinguishment in 1937 of the property right Māori enjoyed in it created a 'Treaty interest', which requires recognition in Treaty settlements today, possibly in a sharing of royalties (a conclusion which successive governments have rejected).¹²

The situation under the CMA – private land

The regime for access to land to obtain minerals under the CMA begins with permits issued by the minister of energy to prospect, explore and mine. Permits to prospect can be issued by the minister for both Crown-owned and privately-owned

minerals, but in the case of permits to explore and mine may be issued only for Crown-owned minerals. (As noted, most minerals are owned by the Crown anyway.) For all permits, entry to land is allowed for what the CMA describes as 'minimum impact activities', which covers geological and land and aerial surveying, and hand sampling (s49(3) and s2). If you are the Crown or you have a permit, you have a 'right' to enter land without the owner's consent provided you give ten working days' notice. Under section 52, the District Court may make an order for access if required. There are some exceptions to this for some types of Māori land (s51). The CMA also provides that any prospecting, exploration or mining on the surface of land that basically does not interfere with all other incidents of ownership or enjoyment of land has a right of access (s57).

For activities other than minimum impact activities there is no right of access. Petroleum is an exception to this (s55). However there is a fallback provision allowing compulsory access to land in the national interest, under section 66. The provision applies where the owner or occupier of land subject to a permit 'fails or refuses to enter into an access arrangement with the holder of the permit' and the permit holder appeals to the minister of energy. If the minister considers that there are 'sufficient public interest grounds', an arbitrator is appointed by order-in-council to determine an access arrangement. The test of 'sufficient public interest' is very broad. The test may be seen as akin to the term 'national interest' in s37(5) of the Mining Act 1971. In respect of that term, Judge Richardson stated in *Stewart v Grey County Council*: 'Under s37(5) the Minister and the Minister alone, is the judge of whether it is in the national interest to declare the land to be open for mining.'¹³

The situation under the CMA – DOC land

DOC land is excluded from all of the above requirements. That is, minimum impact activities cannot be carried out on DOC land without permission of DOC, nor can they be forced for petroleum or any other mineral in the national

interest (s50 and s55(2)(a)). DOC land can be broken into two kinds, 'ordinary' DOC land and schedule 4 land, which is specially protected.

'Ordinary' DOC land

Sections 61(1) and (2) provide for the minister to reach an agreement for ordinary DOC land to be entered for mining purposes. The provision is not specific to DOC. It simply provides that any minister, when approached, must 'have regard to':

- (a) The objectives of any Act under which the land is administered; and
- (b) Any purpose for which the land is held by the Crown; and
- (c) Any policy statement or management plan of the Crown in relation to the land; and
- (d) The safeguards against any potential adverse effects of carrying out the proposed programme of work; and
- (e) Such other matters as the appropriate Minister considers relevant.

The origin of this provision is the previously difficult situation that existed under the Mining Act 1971. As John Luxton put it when introducing this measure into the House in 1991:

In the past, conservation in mining districts has been left basically to the good sense of the Minister of Mines and the former Mines Department. One might now say that mining in conservation areas is left to the good sense of the Minister of Conservation and the Department of Conservation.¹⁴

Before the passing of the 1991 act, the Mining Act 1971 was deemed in at least one case (*Stewart v Grey County Council*) not to be subject to the land use control provisions of the Town and Country Planning Act 1977. And, even following the passing of the Conservation Act in 1987, in *Spectrum Resources Ltd v Minister of Conservation*¹⁵ the High Court determined that the Mining Act still prevailed when the minister of conservation sought to review existing mining consents to bring

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them into line with the conservation values of the 1987 act.

DOC's website explains the current situation:

Basis of DOC's decisions

In considering whether or not to grant access, DOC's main concerns, as outlined in section 61 of the Crown Minerals Act, are that:

- the proposal is consistent with the purpose for which the land is held
- the proposal complies with, or is consistent with, the management plan or the conservation management strategy for the area
- there will be no significant negative effects on the environment.

To date most applications for prospecting and exploration have been granted.

Note that DOC also has to consider, under section 4 of the 1987 act, tangata whenua views on any proposal. Section 4 provides that 'All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

Schedule 4 DOC land

The current protection provided to schedule 4 lands began life as the Protected Areas (Prohibition on Mining) Bill 1990 and the Coromandel Hauraki (Prohibition on Mining) Bill. Over 600 submissions were received on the bills and 2,500 form letters. Forty hours of evidence was heard. Public polling indicated 62% support for bans on mining in DOC land in the Coromandel area. A select committee recommended that the bills be unified and passed as an amendment to the CMA: the Crown Minerals Amendment Act

(No 2) of 1997.¹⁶ Section 66(1A) currently provides:

66 (1A) The Minister of Conservation must not accept any application for an access arrangement or enter into any access arrangement relating to any Crown owned mineral in any Crown owned land or internal waters (as defined in section 4 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977) described in schedule 4, except in relation to any activities as follows:

- (a) That are necessary for the construction, use, maintenance, or rehabilitation, of an emergency exit or service shaft for an underground mining operation, where these cannot safely be located elsewhere, provided that it does not result in –
 - (i) Any complete stripping of vegetation over an area exceeding 100 square metres; or
 - (ii) Any permanent adverse impact on the profile or surface of the land which is not a necessary part of any such activity;
- (b) That do not result in –
 - (i) Any complete stripping of vegetation over an area exceeding 16 square metres; or
 - (ii) Any permanent adverse impact on the profile or surface of the land that is not a necessary part of any activity specified in paragraph (a);
- (c) A minimum impact activity;
- (d) Gold fossicking carried out in an area designated as a gold fossicking area under section 98 of the Crown Minerals Act 1991:

(e) Any activity carried out in accordance with a special purpose mining permit for demonstrating historic mining methods as provided for in the relevant minerals programme required under section 13 of the Crown Minerals Act 1991.

In Parliament the then energy minister, Max Bradford, argued that:

The debate over mining on land managed by the Department of Conservation is long standing, and strong views are held on both sides of the argument. The Bill as reported back is a reasonable approach that seeks to balance competing interests,

reports were heard suggesting that a debate about schedule 4 lands should be started. The industry's silence may indicate that it does not appreciate the minister's bold initiative, which brought thousands out onto the streets to protest against mining.

Despite this setback, there are two remaining proposals the government wants to proceed with.¹⁷ The first is a change to the way that new national parks and other lands of high significance get added to schedule 4. Currently, classification decisions for the classes of conservation area listed in schedule 4 of the CMA are the sole responsibility of the minister of conservation. The intention is that 'these classes be automatically

of Energy is notified when DOC has been instructed to investigate potential new national park areas, and an administrative process has recently been agreed whereby DOC informs the Ministry of Economic Development (MED) of a proposed conservation classification one month before it is publicly notified.

We consider that greater upfront consideration should be given to the other potential values of the land by requiring an Order in Council (subject to Cabinet consideration) to be made to implement classification decisions for those conservation classes listed in Schedule 4. These decisions are currently the sole responsibility of the Minister of Conservation.

This is important, particularly when one considers that the current government has stated that it is 'committed to ensuring that New Zealand is a highly attractive global destination for petroleum exploration and production investment, such that we are able to develop the full potential of our petroleum resources'.

The Cabinet paper also suggests that the minister of conservation might not take into account other uses:

Conservation classification decisions are permanent and so once an area is given a high conservation classification, mineral resources can be effectively sterilised and other uses such as for renewable energy or some types of tourism activities can be compromised. As such we consider the automatic addition of areas is only appropriate if statutory processes exist to ensure that mineral values are properly considered in conservation classification decisions that have this effect.

In relation to the proposal to have the minister of energy assist with decisions on ordinary DOC lands, the Cabinet paper says that:

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The current provisions fail to recognise that the Crown has distinct interests in both the surface values of land and the underlying minerals, both of which it manages on behalf of, and for the benefit of, all New Zealanders.

while still addressing the issues of what additional restrictions to access to Crown minerals we want to have when those minerals are in particular categories of conservation land.

And for the areas under schedule 4 he said:

While the Bill effectively closes these areas to mining, it will enable low impact exploration necessary to identify the margins of resource outside the closed areas and investigations for scientific purposes to continue. Underground mining where access is outside the areas concerned will also be possible.

The schedule 4 debate and remaining proposals

The recent government proposal to open up areas under schedule 4 to mining has lapsed. It is worth noting that while a review of what might be done to encourage mining had been under way for many months before Gerry Brownlee's proposal, no industry groups or expert

added to schedule 4 on their creation or classification' and that this is done 'by Order in Council (subject to Cabinet consideration)'.

The second is that decisions over mining of non-schedule 4 lands should be taken out of the hands of the minister of conservation alone and made joint decisions taken with the minister of energy and resources, with additional factors 'criteria relating to the economic, mineral and national significance of the proposal' being specifically considered.

In relation to the first proposed change, it seems that the government response to many submissions seeking the automatic addition of new national park and high conservation lands to schedule 4 is to reduce the responsibility of the minister of conservation in that process. The Cabinet paper explains:

While there are opportunities to raise the mineral potential of some conservation areas before their classification, this is limited currently. Currently the Minister

of, and for the benefit of, all New Zealanders. The current provisions give pre-eminence to the surface values without any explicit balancing of the two interests. Notwithstanding this most applications for access to Crown land are ultimately approved.

The current provision, s61(2), does allow the minister of conservation to balance competing interests under the heading '(e) Such other matters as the appropriate Minister considers relevant'. However, the intention is to have access determined specifically taking 'full account of the potential national significance and economic benefits of a proposal to explore or mine Crown-owned minerals'. The reasoning is weak. The background discussion paper says:

52 While consideration of the potential economic benefits of a mineral-related proposal is currently possible (land-holding ministers have regard to 'such other matters' as they consider relevant), it is not required. We consider that the Crown's interest in managing Crown resources for the benefit of all New Zealanders needs to be recognised, and additional criteria would achieve this.

53 Additional criteria will not be sufficient in themselves to ensure that mineral and economic objectives are properly considered, because they do not fall within the portfolio or expertise of landholding ministers or their officials. Joint decision making by both the landholding minister and the Minister of Energy and Resources should ensure that the Crown's different interests in the surface values of Crown land and in any subsurface minerals are recognised.

This proposal is then for two changes:

- further criteria to be added for consideration
- the minister of energy and resources to be involved.

On the face of it this proposal would take us back to a situation equivalent to the previous one, with Conservation Act 1987 values competing with those in the

Mining Act 1971. Arguably it goes even further, because now the minister of energy will be sitting at the shoulder of the minister of conservation. One wonders if the industry will thank Brownlee for the further encouragement of anti-mining sentiment that this legislative proposal will no doubt arouse, and which, on the government's own evidence, is not actually required.

In 1991 energy minister Luxton said that:

Mining is an important industry. I ask those people who think that New

the petrochemical industry, using gasification technology to convert lignite to petrochemicals, fertiliser and transport fuels. Lignite can also be converted to briquettes for conventional combustion.

The in-ground lignite resource is estimated at 11 billion tonnes, of which 6.2 billion tonnes (equivalent to 75,000 PJ of energy) is estimated to be recoverable. If extracted at a rate of 20 million tonnes per year, the lignite resource could provide feedstock for most of New Zealand's transport fuel

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Zealand should not have mining, to think again what the country would be like without it – probably there would be mud huts and plenty of trees.

Sustainable management is more likely to be achieved through ensuring that there are as few barriers as possible to investment in exploration. It is also more likely to be achieved with as few government interventions as possible, consistent with the Crown's role as the owner of the resources in ensuring their efficient development.

But times have changed. Some serious scientific opinion suggests that with continued fossil fuel extraction and use we may end up with mud huts and few trees. The March 2010 government discussion paper recognises this in part. In relation to South Island lignite, amongst the 'most competitively priced lignite anywhere in the world', it accepts that there are going to be significant hurdles:

South Island lignite is a major indigenous energy resource which is amongst the 'most competitively priced lignite anywhere in the world'. The resource is suitable for extraction and use as a feedstock to

and petrochemical requirements for 200 years or more. Given the carbon emissions associated with large-scale lignite processing, development of New Zealand's lignite resources is likely to require new technologies such as carbon capture.¹⁸

Since the Resource Management Act provides that effects of discharges of greenhouse gases on climate change cannot be taken into account (s104E) (because we have an emissions trading scheme in place), the discussion paper must be referring to other risks. I wonder if the evaluation of the national significance and economic benefits of mining on conservation land might now include, say, the full cost of carbon sequestration, the international damage to our reputation of, say, large-scale lignite mining if it were to take place on such land, and whether, economically, it will reward us to enter into such adventures given our awful performance in the first Kyoto commitment period, and the risk that a second commitment period imposes further economic burdens.¹⁹

I note a recent comment by minerals law experts Bryan Gundersen and Laurice Avery that:

It should be noted that, as proposed in the discussion document, in relation to current Schedule 4 land, joint approval of the land-holding Minister (that is, the Minister of Conservation) and the Minister of Energy and Resources will be required. This collaborative approach to access agreements may arguably provide even greater protection of conservation estate.²⁰

In 1991 there was a large debate about whether minerals should be excluded from the requirement for sustainability. Some politicians argued in the House that making minerals subject to a test of sustainability would require looking at a lower rate of use and transition towards renewable resources. That was rejected. Is Gerry Brownlee inadvertently reviving the debate under his latest proposal?

Submissions on the legislation should be interesting.

- 1 SC7/2010, <http://www.courtsofnz.govt.nz/business/calendar/upcoming-cases/supreme-court>.
- 2 *Mueller v Taupiri* (1900) 20 NZLR 89 (CA).
- 3 Ministry of Economic Development, *Coal Bed Methane in New Zealand: a discussion paper on a proposed legislative framework for the management and allocation of rights*, February 2003, p.11, states: 'In a letter to stakeholders dated 3 October 2002, the Ministry has previously advised that on the basis of these definitions:
 - Coal bed methane is petroleum and not coal under the Crown Minerals Act; and
 - Coal developers need to obtain a petroleum permit if they intend to explore for or develop coal bed methane specifically.'
- 4 'Drawing from Talmudic Law, the jurist Accursius of Bologna wrote the phrase *cujus est solum, ejus est usque ad coelum et ad inferos* (to whom belongs the soil it is his, even to heaven and to the middle of the earth) as a gloss on Justinian's Digest. By the 16th century this maxim had become accepted common law doctrine for determining the extent of the rights enjoyed by a tenant in fee simple ("landowner"). The English Laws Act retrospectively declared that "so far as applicable to the circumstances of the Colony of New Zealand," all statute and common laws of England became "part of the laws of New Zealand." This was confirmed by the Imperial Laws Application Act 1988. Since 1840 to the present day there have been few instances where the court has held that a statute or common law of England was not applicable to the circumstances of the colony of New Zealand. Hence, in the absence of statutes overriding it, the maxim is part of New Zealand law.' <http://www.mandm.org.nz/2010/03/can-state-expropriation-of-minerals-be-justified-part-i.html>.
- 5 *Parliamentary Debates (Hansard)*, 1997, 4 July, p.3042.
- 6 Waitangi Tribunal, *Hauraki Report*, Wai 686, 2006, vol.1, p.257.
- 7 *Ibid.*, vol.2, p.525.
- 8 Crown Minerals Act 1991, s2.
- 9 Ken Piddington, personal communication, 2009.
- 10 By the Resource Management Act 1991 – see schedule 6. See also transitional provisions for some licences under the 1959 act in the CMA, s110(f).
- 11 Waitangi Tribunal, *Petroleum Report*, 2003, Wai 796.
- 12 <http://www.beehive.govt.nz/node/18433>.
- 13 *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA), 581.
- 14 *Parliamentary Debates (Hansard)*, 1991, 4 July.
- 15 [1989] 3 NZLR 351; (1988) 7 NZAR 333 (HC).
- 16 *Hansard* reference.
- 17 Cabinet Paper, *Stocktake of Schedule 4 Crown Minerals Act – Outcomes – 20 July 2010*, paras 34 and 35, http://www.med.govt.nz/templates/MultipageDocumentTOC___44103.aspx?&MShiC=65001&L=0&W=stocktake+of+schedule+4+&Pre=%3Cb%3E&Post=%3C/b%3E.
- 18 Ministry of Economic Development discussion paper, *Maximising our Mineral Potential: stocktake of schedule 4 of the Crown Minerals Act and beyond*, March 2010, http://www.med.govt.nz/templates/MultipageDocumentTOC___42792.aspx, p.8.
- 19 Or perhaps, even worse, there is no second commitment period and countries revert to their own systems of carbon tariffs.
- 20 <http://www.contrafedpublishing.co.nz/Energy+NZ/May-June+2010/Crown+land+already+protected.html>.



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