
Supreme Court Confirms Department of Conservation's Decision on Ruataniwha Dam Land Exchange Unlawful

The Ruataniwha Water Storage Scheme will flood 22 hectares of land in the Ruahine Forest Park in the Hawke's Bay. The Forest Park is held by the Minister of Conservation under the Conservation Act 1987 as conservation park, a category of specially protected land. The Director-General of Conservation decided to effectively downgrade the conservation status of the land to be flooded, to enable it to be exchanged for other land to be provided by the proponent of the dam, Hawkes Bay Regional Investment Company Limited.

The Director-General's decision, challenged by Forest and Bird, was based on the relative conservation values of the 22 hectares of forest park compared with the conservation values of the land for which it was to be exchanged. The evidence was that the forest park land has high conservation values which warrant continued protection, and there was no suggestion in the Director-General's decision that the forest park land did not still warrant protected status. The Director-General's decision was made on the basis that overall, there would be a net conservation gain from the exchange.

The majority of the Court of Appeal held that the conservation park status of the land could only be revoked if its intrinsic values had been detrimentally affected such that it did not justify continued preservation, for example if the purposes for which the land is held were undermined by natural or external forces. The majority of the Supreme Court agreed, although it did not consider that only complete destruction of the values justifying protection and preservation could warrant revocation. Rather, the status could only be revoked if the intrinsic values of the land did not justify continued preservation and protection so that the status of conservation park was inappropriate. In majority decisions, both Courts held that any gain arising from an exchange should not have been considered when deciding whether to revoke the special conservation status of the land.

The decision has been celebrated by environmental groups but the Government has

signalled that it may change the law to enable such exchanges to occur in future. In her press release of 6 July 2017, Conservation Minister Hon Maggie Barry noted that, for the last 30 years, the Government believed that the legislation allowed low value conservation land to be swapped for higher value land, and that law changes to promote best conservation outcomes would now need to be investigated. The Government's view is that the Supreme Court majority decision that the revocation of conservation status and the exchange of land steps could not be conflated created a clear problem, particularly on the back of the differences between the High Court and Court of Appeal.

Meanwhile, work to secure Department of Conservation land for the proposed Waimea dam in the Tasman District is reported to be on hold pending advice on the implications of the Supreme Court decision for that project. Tasman District Council is reported to be considering acquiring the conservation land it requires under the Public Works Act 1981 instead. Forest and Bird does not appear to have a formal position on use of the PWA as yet but have suggested that there are issues with the use of the PWA process. Given that local authorities have no power to "take" Crown land under the PWA, we expect that any attempt to use the PWA to acquire conservation land in the absence of agreement with the Ministers of Conservation and Land Information would likely fail. Those same issues would apply to any attempt by the Hawkes Bay Regional Council to take land for the Ruataniwha scheme. The Hawkes Bay Regional Council is reported to be divided on any potential use of attempting the PWA process.

Proponents of the Waimea dam may be best to wait for whatever solution Parliament chooses to offer – but that wait will likely need to extend beyond the election.
