Interest Groups, Vested Interests, and the Myth of Apolitical Administration

The Politics of Land Tenure Reform on the South Island of New Zealand

Report Submitted with Honour

to

Fulbright – New Zealand

February 2006

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Abstract

This report explores the political history, property rights, and administrative politics of the land tenure reform process to ask why the Crown has paid farmers millions of dollars to convert land from leasehold to freehold. Since 1992, runholders have received collectively 58% (or 165,446 hectares) of the reformed pastoral estate with fee-simple title, and $15.5 million. The report documents the results of research in the South Island of New Zealand during Fulbright grant year 2004-05.

Land tenure reform is a process of dividing up the Crown pastoral estate into freehold and public conservation land. The pastoral estate constitutes about one-tenth of NZ's landmass. The Crown holds all 2.4 million hectares of the pastoral estate; and it has alienated, or leased out, certain use rights to the lessees. Now the Crown is in the process of purchasing pastoral and occupation use rights and land improvements back from the lessee, on the hectares shifting into DOC custody. And the lessees are in the process of purchasing a whole bundle of Crown-held use rights on the hectares passing to freehold. This Crown-held bundle of use rights includes subdivision, condominium construction, ski field development, viticulture, safari park development, and automobile tyre testing centre development. The Crown-held bundle even includes such mundane use rights as planting grass seeds without prior consent of the Commissioner of Crown Lands.

Chapter 2 deconstructs the numerical results – hectares and dollars – of the land reform policy endeavour so far, and reveals that these numbers are contested. Quite simply, it depends on what you count and how you count them. And those methodological counting decisions, while appearing dry and clinical, most certainly are not. Numbers are the stuff of public policy, and decisions on how to count them are the stuff of politics. Further, the number of hectares is misleading, as it is *use rights* being exchanged here, not the hectares themselves.

Chapter 3, "Interest Groups, Property Rights, and States' Rights: The Sagebrush Rebellion and New Zealand Land Tenure Reform", examines the political history of South Island public grazing land, from first establishment of pastoral licenses in 1856 to the 1998 passage of legislation governing the disestablishment of the pastoral lease system. It takes a comparative perspective, using the Sagebrush Rebellion launched by ranchers in the American West as a lens. It concludes that NZ farmers' push for freehold succeeded while the American ranchers' campaign failed, for three reasons: 1) property rights arrangements in NZ pastoral leases allow lessees to exclude recreationists and other trespassers, while not in the US; 2) the lack of legally-sanctioned reliable recreation access and conservation provisions in the leases led NZ's most prominent conservation and recreation advocacy groups to join the farmers' campaign for land tenure reform, while similar US groups opposed the Sagebrush Rebellion; 3) NZ farmers were able to use administrative and institutional momentum from the state sector reforms of the 1980s in their campaign for reform.

Next chapter 4, "Trading Sticks with the Crown: Redistributing Property Rights to Effect Land Use Change" explores the current distribution and redistribution of property rights in the Crown pastoral estate, in order to examine the merits of using property rights as a tool to create land use

change. It deconstructs property rights arrangements in pastoral leases into their constituent parts and finds that there is some uncertainty surrounding the relationship between the lessee-held exclusive occupation right and the Crown-held non-pastoral use rights. It concludes that this uncertainty is a matter to be addressed by the Courts, not by government contractors or even government officials. Finally, it offers alternative policy tools to achieve the desired changes in land use with an eye to reducing the cost to the government.

The last chapter, “Who is sticking up for the Crown? The myth of apolitical administration in New Zealand land tenure reform” evaluates the results of land reform on the national scale by looking at the administrative politics within the process managed by Land Information New Zealand (LINZ). It observes that the numerical results of tenure review are strongly biased in favor of the farmer, with the farmers receiving 58% of the land as freehold, fee simple private property, *and* receiving millions of dollars in "equalization payments". It concludes that LINZ’s subscription to the myth of apolitical administration is leading the agency that represents the Crown’s vested interest in the land to take a position of neutrality in negotiations instead of one of advocacy. LINZ relies on a functional split between policy and operations, which in turn relies on the oldest trick in the book of public administration – the politics-administration dichotomy. These two models share a common goal – avoiding agency capture in policy implementation – and administrative tool – neutrality.

But in this case, striving for neutrality is neutralizing the Crown’s vested interest in the land. LINZ cannot be neutral and advocate for the Crown’s interest at the same time. Thus over-reliance on the myth of apolitical administration is leading to a result that out-captures agency capture theories of interest group politics

This report does not paint a rosy picture of land tenure reform. It concludes that the myth of apolitical administration supercedes interest group politics and property rights, and leads the Crown to take a neutral stance in the face of powerful special interests motivated to diversify land use, be it for venison farming, viticulture, or lifestyle blocks.

It is impossible to remove politics from inherently political decisions such as redistributing valuable resources. And it can be a dangerous endeavor. In this case, striving for neutrality in order to achieve a fair, unbiased, and uncaptured result is doomed to fail on all counts, no matter how well-intentioned the attempt.

The Crown is asserting neither its property rights nor its bargaining powers. Instead, the Crown's position of neutrality leads it to give away valuable property rights and pay constituents to take it. In short, the myth of apolitical administration makes the Crown complicit giving away freehold title to New Zealand's iconic high country, and paying the lease-holders to take it.

To sum up, the politics of land tenure reform remain win-win as long as the Crown agrees to lose. This is not an indictment of LINZ. I have no data to support a claim that the agency’s attempts at neutrality are anything but honest, competent, and well-intentioned. But placing “neutral” and “vested interest” in the same task description will not work. One will lose. In this case, it is the vested interest, the Crown, and ultimately the NZ people.

Acknowledgements

All scholars seek to stand on the shoulders of giants in their work. I am proud to stand on several, even if one of them has a very bad back. Mentors and friends at Berkeley, Yale, and Pomona College shaped me, my research questions, and means of finding answers more than they know. Most especially, my PhD supervisor Sally Fairfax and her bad back undergird everything. Though she taught me everything about US public land politics and nothing about NZ, somehow her critical eye is omnipresent in my work. Sally and her protégés as well as Todd LaPorte, Joseph Sax, Bob Kagan, Keith Gilless, Louise Fortmann, Chris Ansell, Jonah Levy, and many others at Berkeley taught me volumes about how to look at NZ. But all errors are of course mine.

I also thank many academics who have read and commented on various drafts and parts of this report, especially Ton Buhrs, Kevin O'Connor, Kay Booth, and Jean McFarlane at Lincoln. Further afield from Lincoln, I thank Phil Meguire and Alfred Guender in the economics department at Canterbury for their help with the numbers, and David Grinlinton at U Auckland Law School for his help with NZ land law. And more distant but ever-present, I thank Gregg Cawley at U Wyoming, Leigh Raymond at Purdue, Sally at Berkeley, Kevin Eddings at Yale, and my longsuffering but ever-cheerful parents, LouAnn and the other David Brower. How my flatmates put up with me and my horrific cooking on my Fulbright year is a mystery, but I thank them heartily. Finally, I thank the small but engaging audience of 4.7 for their valuable feedback when I presented an early version of this research at Pomona College in California

And then there's Fulbright. This project bears little resemblance to that which I proposed almost two years ago now. My original project sounded fascinating on paper, or at least good enough for a Fulbright. But on arrival I quickly learned that New Zealand is not the US, and what is fascinating in America may well be irrelevant here. I have great respect for Fulbright-NZ for encouraging me to study what is most interesting, not necessarily sticking doggedly to that which I set out to do.

It is with great sadness that I end my year as a Fulbright grantee. When I received the award, I was flushed with the honor. But when I met my fellow Fulbright colleagues I realized the magnitude of the Fulbright, and became awed by the honor. I am continually blown away by their creativity, intellectual engagement, and resourcefulness. And the more I read about the Fulbrighters who have come before us, the smile fades and is replaced by a glow. For many years I have been surrounded by supreme talent at Yale, Berkeley, and Pomona College. But somehow Fulbrighters are different. Somehow they stand out in the crowd of scholars. I am awed to be in their company. Albeit mystifying, it is an unspeakable honour to call myself one of them.

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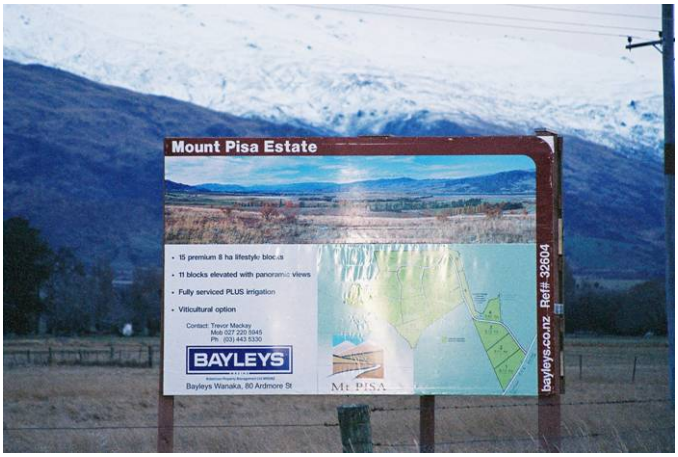
Chapter 1 Introduction

There is something different about the light in New Zealand's high country.[1] It makes the details of topography so crisp as to appear fake, or somehow artificially enhanced. On a clear day in Wanaka, it is easy to think you have just stepped out of Plato's cave. It is as if you have spent your whole life experiencing the world in two dimensions or in black and white, and now the world suddenly has three dimensions, in Technicolor.

And on a cloudy day in the Crown Range, Aslan and his Narnian compatriots are surely not far away.

Figure 1: The pastoral estate between Wanaka and Mt Aspiring National Park.



But the high country landscapes are changing – from pastoral sheep farming to viticulture, from broad expanses of Crown land to private "slices of heaven,"[2] and from extreme remoteness to Xtreme™ snowboarding.

Figure 2: Mount Pisa Station lifestyle blocks for sale, northeast of Wanaka, New Zealand.

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[1] "high country" is defined as land above 550m.
[2] Called lifestyle blocks in New Zealand, and ranchettes in California. See Figure 6.

Since 1992, the Crown has conveyed freehold, fee-simple, title to about 58% of the reformed pastoral estate to farmers, retaining 42% in full Crown ownership to be managed for conservation and recreation. With the 1998 passage of the Crown Pastoral Land Act, or CPLA, Parliament gave legal sanction to the land tenure reform process. The reform process is managed by the government agency Land Information New Zealand, or LINZ, with much of the technical operations performed by professional contractors. When the land reverts to the Crown, it shifts into the management of the Department of Conservation, or DOC, steward of about one third of New Zealand's landmass. That farmers would get more land than the Crown[3] in a negotiation is not surprising. Both theories of public choice and agency capture would predict this outcome.

What is more surprising, and not predicted by models of interest group politics, is that the Crown has paid farmers NZ$15.5 million. This report documents the results of an exploration in land tenure reform on the South Island of New Zealand during Fulbright grant year 2004-05. It explores the political history, property rights, and administrative politics of the land tenure reform process to ask why the Crown has paid farmers millions of dollars to convert land from leasehold to freehold.

Overview of report

Chapter 2 outlines the research design and methods, and offers an important deconstruction of the politics of the quantitative data used in this report. Chapter 3 examines the political history of South Island public grazing land, from first establishment of pastoral licenses in 1856 to the 1998 passage of legislation governing the disestablishment of the pastoral lease system. It takes a comparative perspective, using the Sagebrush Rebellion launched by ranchers in the American West as a lens. It concludes that NZ farmers' push for freehold succeeded while the American ranchers' campaign failed for three

[3] Statisticians might wonder if these 2 columns of data with such high variability are actually different. Statistically, are the farmers getting more? Yes. A 2-tailed t-test of statistical significance reveals a p-value of .0075, indicating that the two columns of numbers (to DOC and to freehold) are statistically different, and indicating that the 58-42 split is indeed statistically different from a 50-50 split. And a similar t-test of the proportional splits (%freehold and %DOC) yields an even stronger p-value of approximately 0.00000000125. In other words, this is not a fluke, but a pattern.

reasons: 1) property rights arrangements in NZ pastoral leases allow lessees to exclude recreationists and other trespassers, while not in the US; 2) the lack of legally-sanctioned reliable recreation access and conservation provisions in the leases led NZ's most prominent conservation and recreation advocacy groups to join the farmers' campaign for land tenure reform, while similar US groups opposed the Sagebrush Rebellion; 3) NZ farmers were able to use administrative and institutional momentum from the state sector reforms of the 1980s in their campaign for reform.

Next chapter 4 explores the current distribution and redistribution of property rights in the Crown pastoral estate, in order to examine the merits of using property rights as tool to create land use change. It uses an abstract theory of property as a bundle of rights, rather than a thing in itself. Borrowing from scholarship on natural resource usufructuary rights in the US, it deconstructs property rights arrangements in pastoral leases into their constituent parts and finds that there is some uncertainty surrounding the relationship between the lessee-held exclusive occupation right and the Crown-held non-pastoral use rights. It concludes that this uncertainty is a matter to be addressed by the Courts, not by government contractors or even government officials. Finally, it offers a few alternative policy tools to achieve the desired changes in land use with an eye to reducing the cost to the government.

The last chapter evaluates the results of land reform on the national scale. It observes that the numerical results of tenure review are strongly biased in favor of the farmer, with the farmers receiving 58% of the land as freehold, fee simple private property, *and* receiving millions of dollars in "equalization payments". It concludes that LINZ's subscription to the myth of apolitical administration is leading the Crown agency that represents the Crown's vested interest in the land to take a position of neutrality in negotiations instead of one of advocacy. LINZ relies on a functional split between policy and operations, which in turn relies on the oldest trick in the book of public administration, the politics-administration dichotomy. These two models share a common goal – avoiding agency capture in policy implementation – and administrative tool – neutrality. But in this case, striving

for neutrality is neutralizing the Crown's vested interest in the land. LINZ cannot be neutral and advocate for the Crown's interest at the same time. Thus over-reliance on the myth of administrative neutrality is leading to a result that out-captures agency capture theories of interest group politics.

This report does not paint a rosy picture of land tenure reform. It concludes that the myth of apolitical administration supercedes interest group politics and property rights, and leads the Crown to take a neutral stance in the face of powerful special interests motivated to diversify land use, be it for venison farming, viticulture, or lifestyle blocks.

It is impossible to remove politics from inherently political decisions such as redistributing valuable resources. And it can be a dangerous endeavour. In this case, striving for neutrality in order to achieve a fair, unbiased, and uncaptured result is doomed to fail on both counts, no matter how well-intentioned the attempt. The Crown is asserting neither its property rights nor its bargaining powers. Instead, the Crown's position of neutrality leads it to give away land title and pay constituents to take it. In short, the myth of apolitical administration makes the Crown complicit giving away freehold title to New Zealand's iconic high country, and paying the lessees to take it.

To sum up, the politics of land tenure reform remain win-win as long as the Crown continues to lose.

Chapter 2
Research Design, Methods, and the Politics of Numerical Data

Research design and methods

The research scale, scope, and methods were designed around the character and availability of data about the land tenure reform process and results. Land reform is a controversial business. The only relatively uncontested information is the results -- the number of hectares allocated for conservation and for freehold, and the aggregate number of dollars exchanged between lessees and the Crown. Hence this is a results based analysis, starting with the end of the story, so far, and identifying themes and patterns in the story, the political process, that explain the results. The "so far" represents an important caveat of the sample size of the results to date. Thirteen years into the program, just over 20% of the total population of leases have completed the reform.

There are two forms of results data, hectares and dollars, publicly available on different scales. The number of hectares designated to freehold and to full Crown ownership is available on a micro scale, for each farm that has undergone reform. The amount of money exchanged between lessees and the Crown is only available in LINZ annual reports.[4] Hence this data is available only at the macro scale, in aggregated form. As such, the research is on a macro scale.[5]

Research to identify elements of the process that led to the results followed a triangulation design, but again tailored the research methodology to the character and availability of data sources. Table 1 lists the data sources and methods employed in this research.

The land tenure reform process takes place behind closed doors, involving government contractors, the lessee, government officials, and other

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[4] According to LINZ officials, the amount of money exchanged on each farm is classified as confidential in order to protect the privacy of personal family finances.

[5] It does not examine the qualitative peculiarities of each of the leases that have signed agreements, distributed land, and received equalization payments. Rather, it looks at aggregate results on a national level. It does not re-examine the assessment of conservation or production values that led to a particular designation of land. Nor does it examine the valuation of property interests. In short, it takes the results as given, and looks of the politics of the negotiation process of that led to the result.

interested parties who are invited to participate in the consultation process. As it is a closed process, the only available data on the process itself is secondary data -- interviews, government documents, media accounts, and legal analysis. It is important to note that this research was conducted on a Fulbright grant, by a visiting American researcher new to New Zealand. As such, the data was gathered through foreign eyes, ears, and perspective. Cognizant of the culturally and politically loaded topic of land valuation and ownership, my foreign status, and the secondary character of the available data on the political process, I took the data at face value -- uncritically and perhaps optimistically. For example, when government officials reported that they were neutral, making decisions in an objective and unbiased manner, I believed that they made good-faith efforts to remain neutral despite the weighty theory and literature that assert that such neutrality is impossible. In other words, as a foreign Fulbrighter attempting to adopt the humility and open-mindedness of Candide, I gave interviewees the benefit of the doubt no matter how substantial the doubt.

Table 1: Research methods and data sources

Methods	**Data sources**
two tailed t-test of statistical significance	number of hectares designated amount of money exchanged (from LINZ, DOC, and www.linz.govt.nz)
semi-structured key informant interviews	Government officials Contractors interest groups staff and volunteers lessees advocates for lessees academics interested observers of the process
document review	Cabinet papers LINZ policy papers DOC policy papers public submissions on CPLA and individual land tenure reform deals policy papers of interest groups (farmers, recreation, and conservation)
discourse analysis	1992-2005 land reform articles in The Christchurch Press, and The Otago Daily Times 1980-2005 land reform articles in Federated Mountain Clubs Bulletin and Forest and Bird

legal analysis	Crown Pastoral Land Act (CPLA) of 1998 CPLA legislative history (materials in the Parliamentary Library, Wellington; interviews with 1990s policymakers) Land Act of 1948 Cabinet papers
observational landscape analysis	Photographs of changing land use in the Lakes District surrounding Queenstown and Wanaka, among the first leases to undergo land tenure reform in 1990s (and a few 1980s attempts)

A note about numbers and politics

But exactly how "uncontested" are these data measuring policy results to date? Even numbers are far from uncontested data, as counting is an inherently political process (Stone, 2001). Though they convey a message of authority and precisions, many numbers are far from authoritative and precise – most especially in a controversial political process like the redistribution of property rights. Quite simply, it depends on what you count and how you count them. And those methodological counting decisions, while appearing dry and clinical, most certainly are not. Numbers are the stuff of public policy, decisions on how to count them are the stuff of politics. According to Stone (2001, p 184, 185), numbers "tend to imply certain solutions to a problem, so people who have particular solutions to peddle will promote the measures that point to their solutions. … [Numbers in politics] are not only strategically selected but strategically presented as well. Numbers never stand by themselves in policy debates; they are clothed in words and symbols and carried in narrative stories."

Decisions about what to include in and exclude from a sum of numbers are strategic, and can garner or lose support for a policy. According to Stone:

> Counting must begin with with categorization, which in turn means deciding whether to include or exclude. … Categorization thus involves the establishment of boundaries in the form of rules or criteria tat tell whether something belongs or not. … To categorize in counting … is to select one feature of something, assert a likeness on the basis of that feature, and ignore all the other features. To count is to form a category by emphasizing some feature instead of others and excluding things that might be similar in important ways but do not share that feature. … Every number is a political claim about 'where to draw the line.' Projections, correlations, … and other fancy manipulations of

> numbers [not to mention p-values!] all rest on the decisions about 'counting as' embodied in their numbers, so they, too, are claims about similarities and differences. And similarities and differences are the ultimate basis for decisions in public policy. (Stone, 2001 pp. 164,165, 167)

This strategic maneuvering around numbers is not unique to the right or the left. It occurs in all parties, all allegiances, and all policy debates.

While appearing clear and incontrovertible, numbers can mystify and even obscure. As such, they deserve careful scrutiny and as much deconstruction as possible. Let us take a February 2005 Cabinet policy summary document on the progress towards the government's High Country Objectives, excerpted below. The operative numbers in this summary are listed in the second paragraph: 66 leases finished, 94,500 hectares to Crown, and 93,500 to freehold; while the numbers that qualify the operatives are listed in the first paragraph -- 2 policy tools, 10 objectives. Let us quickly deconstruct the operative numbers in light of their qualifiers, in the hopes of clarifying the source of the numbers for this Fulbright report. From page 1:

Cabinet Policy Committee

POL (05) 14

7 February 2005

Copy No: 37

Summary

The Crown uses two main tools to achieve the high country objectives approved in 2003: tenure reviews and lease purchases. The ten high country objectives are listed in recommendation 1.

Tenure review has been completed for 66 pastoral leases. Of the remaining 273 leases, 154 are at various stages of the tenure review process. Approximately 94,500 hectares of land have been returned to full Crown ownership, either through tenure review or by lease purchase. About 93,500 hectares have been freeholded.

Reading page 1, it appears that land reform is yielding equal amounts of land for conservation as for freehold. But the very first operative number (2 policy tools) qualifies the apparently equal 93,500 – 94,500 split in the second paragraph. Though technically accurate, this even split conflates the results of the land tenure reform policy tool with the un-named Nature Heritage Fund (NHF), which acquires land and land interests for conservation, and is not described in the Cabinet document until page 3. Page 3 specifies that NHF

lease purchases account for 45,500 hectares. Does this matter? In a word, absolutely. Page 3:

Whole or partial lease purchase

12 note that purchases of whole or parts of pastoral leases outside the tenure review process have resulted in approximately 45,500 hectares of land returning to full public ownership and control;

This Fulbright report focuses on percentages and proportions (of land to DOC and to freehold) that result from land tenure reform. Including NHF purchases in the summary totals drastically changes the proportion of land returning to the Crown. With the NHF purchases included, the proportion of land types exchanged looks like an even split of 49.7% to freehold and 50.3% to DOC. Excluding NHF purchases from these numbers paints a different picture, far less favourable to conservation: 65.4% to freehold and 34.6% to DOC. Again while not disingenuous, this method of counting is confusing at best and misleading at worst.

Then there are the 66 leases. How are they counted, and how are their hectares accounted for? Should we include data only from reforms completed after passage of enabling legislation in 1998? Or should we include reforms that took place between 1992 and 1998 in an administrative process under the Land Act? This Cabinet paper has a confusing way of counting leases. It says that 66 have undergone reform, but only seems to list the hectares exchanged in the reforms after 1998. According to a government document attached to this Cabinet paper, 36 leases underwent reform between 1992 and 1998,[6] though the Christchurch Press counts only 34 (Hayman 2003). Relying on DOC numbers I count only 35 leases completed from 1992-1998, of which 107,855 hectares (or 59%) were converted from pastoral lease to freehold. And 75,610 hectares (or 41%) passed from pastoral lease to full Crown ownership under DOC management. By the Christchurch Press's count though, only "about 40%" converted from pastoral to DOC prior to CPLA.[7]

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[6] as reported on page 1 of a report back document attached to the Cabinet paper (at http://www.linz.govt.nz/docs/crownproperty/cabinet_policy_south_island_objectives.pdf)

[7] Kamala Hayman, "Tenure Tensions," *The Press*, 22 November 2003 2003.

Though the pre-1998 leases are included in the number (66) having undergone reform, this front page summary of achievement of high country objectives does not seem to account for the pre-CPLA leases' 180,000 hectares. Does inclusion of hectares exchanged prior to 1998 change the proportions of interest to this report? Well it depends on to which numbers they are compared.

By my estimation, the most comprehensive, inclusive, and forthright counting methodology is to include all leases, all hectares,[8] and all dollars exchanged in land tenure reform both before and after 1998. And an evaluation of land tenure reform would only count results from that policy, not from the Nature Heritage Fund. So a count that includes both pre- and post-CPLA exchanges,[9] and excludes hectares purchased by NHF yields the following totals: 178,288 hectares (or 61%) to freehold; and 114,013 hectares (or 39%) to DOC. 61-39 looks very different from 50-50, and has very different implications for the future of land policy.

So there is potential for seeing 30, 34, 35, 36, or 66 leases completed, with a split of 50-50,[10] 65-35,[11] 61-39,[12] 59-41,[13] or 60-40.[14] These are all perfectly logical conclusions from published numbers, but each leads to a different answer to the question "how are we going with land tenure reform?"

And then there is the money. Nowhere does this summary of policy results list the cost of this policy. Nowhere does it say how much the lessees are paying the Crown for their collective 61% share, nor how much the Crown is paying the lessees to buy out their collective property interests. The

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[8] And if possible, the number of hectares should be counted after performing the final survey. But regardless of survey timing, if the summary of results includes the pre-1998 lease numbers, it certainly must include their hectares.

[9] In this count, I use the post-CPLA hectares counted by the Cabinet document (94,500) minus the NHF purchases as reported on p. 3 (45,500), plus hectares transferred to DOC pre-CPLA

[10] Described on page 1 of Cabinet Policy Committee, "South Island High Country Objectives," (Wellington: Cabinet Office, 2005)..

[11] From page 1, but excluding the Nature Heritage Fund purchases described on page 3.

[12] Counting pre-CPLA results + post-CPLA results reported on page 1 – NHF purchases.

[13] Pre-CPLA results.

[14] Admittedly, this is probably just a case of rounding down by the popular media. Hayman, "Tenure Tensions."

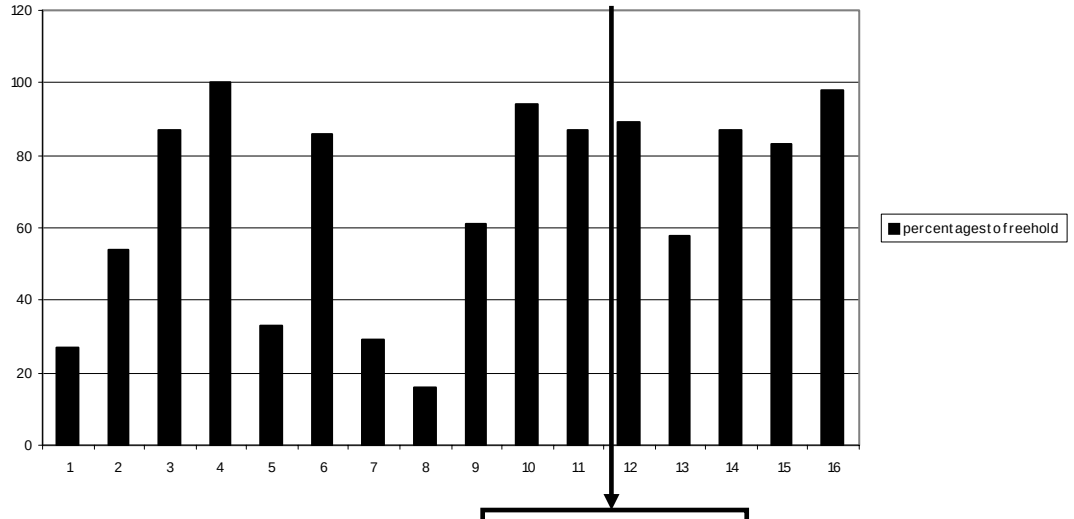
individual financial agreements are classified as confidential under §9(2)(a) of the Official Information Act 1982, to "protect the commercial position of the person … who is the subject of the information."[15] Those individual numbers are sealed, and unpublished in the media. The cumulative numbers are available in the LINZ annual reports by fiscal year (see chapter 4). But they still remain all but unpublished in the media. In politics information is power. Control of the measurement and release of information is strategy.

The numbers I use in this report are accurate to my best endeavour. I collated them from spreadsheets mailed to me by LINZ and DOC staff in Dunedin, Christchurch, and Wellington, and from substantive proposal summary documents published on the web at www.linz.govt.nz. I do not include Nature Heritage Fund purchases in my data, unless it is somehow included in spreadsheet data without my knowledge. I use aggregate numbers for each lease: the total number of hectares transferred to DOC, even if a significant portion has been leased back to the lessee for grazing; and the total number of hectares converted to freehold, even if a conservation covenant restricts development on a large portion of it. Finally, I count the hectares with regard for the fiscal year. As the dollar results are grouped by fiscal year, so will I group the hectare results. As such, the numbers I use include only the deals signed on or before 30 June 2005 because the dollar results end on that date as well.

This grouping by fiscal year brings up one last point about strategies and counting. Just as charitable contributions rise at the end of a tax year, government budgets and implementation patterns sometimes revolve around the end of the fiscal year. Witness the pattern of hectares distribution from the end of FY04-05, and how it differs to the distribution at the beginning of FY05-06.

[15] Letter (ref: 20050284) to author from Treasury regarding Official Information Act request.

% of pastoral land passed to freehold just before and just after 30 June, 2005 (end of FY05)



Date completed	Ha to freehold[16]	Ha to DOC	% to freehold	% to DOC
07-May-04	775	2070	27.2%	72.8%
10-Jan-05	4230	3645	53.7%	46.3%
28-Jan-05	3088	447	87.4%	12.6%
02-Feb-05	1593	3206	33.2%	66.8%
02-Feb-05	111	992	10.1%	89.9%
24-Feb-05	161	26.695	85.8%	14.2%
19-May-05	7013	16,874	29.4%	70.6%
01-Jun-05	2556	9367	21.4%	78.6%
30-Jun-05	9216	5843	61.2%	38.8%
		END OF FY 05		
11-Aug-05	6029.824	407	93.7%	6.3%
19-Aug-05	761.3	117.5	86.6%	13.4%
30-Aug-05	3523	396	89.9%	10.1%
16-Sep-05	1647	1186.205	58.1%	41.9%
11-Oct-05	2711	1619	62.6%	37.4%
12-Oct-05	444	65.58	87.1%	12.9%
12-Oct-05	729	146.1964	83.3%	16.7%
20-Oct-05	not available			
04-Nov-05	1278.766	31	97.6%	2.4%
18-Nov-05	not available			

[16] Data in this table obtained from www.linz.govt.nz.

More on numbers: it's use rights, not hectares

Once it is clear which numbers are included, which are not, and how they are counted, I let us be clear about exactly what is being counted. We must also ask whether it can and should be counted? For "to count something is … to assert that it is an identifiable entity with clear boundaries. No one could believe in a count of something that cannot be identified, so to offer a count is to ask your audience to believe that the thing is countable." (Stone, 2001 p. 173)

Though countable, hectares and dollars are not exactly what is being exchanged in land tenure reform. As chapter 4 describes in detail, land tenure reform is not an exchange of hectares, but rather an exchange of *use rights* on those hectares.

Let there be no mistake, the Crown holds title to all 2.4 million hectares of the pastoral estate. The Crown has held title since the purchases in the 1840s and '50s, most especially the Kemp's Deed purchase of 1848. The Crown has alienated, or leased out, certain use rights to the lessees. Now the Crown is in the process of purchasing pastoral and occupation use rights and land improvements back from the lessee, on the hectares shifting into DOC custody. And the lessees are in the process of purchasing a whole bundle of Crown-held use rights on the hectares passing to freehold. As chapter 4 details, this Crown-held bundle of use rights includes subdivision, condominium construction, ski field development, viticulture, safari park development, and automobile tyre testing centre development. The Crown-held bundle even includes such mundane use rights as irrigation, fencing, and planting grass without prior consent of the Commissioner of Crown Lands.

And finally: it's qualitative, not quantitative

It is use rights being exchanged, not hectares. But use rights are hard to measure, and cannot be counted. Hence the research design revolves around the available data, fallible though they may be. At its heart, this is a qualitative study, asking how did we come to arrive at this result? The numbers are an indicator of the result so far. The guts of the research and analysis revolve around qualitative data gathering and analysis.

Chapter 3
Interest Groups, Property Rights, and States' Rights: The Sagebrush Rebellion and New Zealand Land Tenure Reform

Introduction

This chapter presents the political lead-up to land tenure reform through the lens of similar efforts in the United States. It asks why New Zealand farmers successfully attained freehold rights to pastoral land, while American ranchers were not successful in their 1960s-1980s campaign to transfer title to grazing land from the federal government to the states. Both campaigns sought to devolve authority over public land, though the NZ campaign sought to devolve it further. The chapter concludes that differences in property rights arrangements led to near universal support for NZ land reform, and staunch opposition from the environmental interest groups in the US.

In the 1960s, a group of ranchers in the western U.S. launched the Sagebrush Rebellion, a political movement which pushed for, among other things, devolution of authority to the Western public grazing land under grazing permits from the federal government to the states.[17] At the same time in New Zealand, South Island "runholders", or sheep ranchers operating on pastoral land leased from the Crown, had been pushing sporadically for decades for an affordable way to convert their lease land to "freehold", fee-simple private property.[18] With some alterations over the years, American grazing permits are alive and well, still administered by the Bureau of Land Management (BLM).

But since 1992, New Zealand has been slowly eradicating its pastoral leases – transferring the title for (mostly lower-elevation, below 1000m) land "capable of economic use" (*Crown Pastoral Land Act*, 1998,§24(a)(ii)) to the

[17] They advocated for many other things as well, most notably "States' Rights," but this article focuses on privatization of publicly-owned grazing land.

[18] According to former director of the Department of Lands and Survey, pastoral lessee and former member of Federated Farmers High Country Committee, and former policy adviser to Parliamentary sponsor of statute governing land reform (CPLA).

runholders as freehold land, and restoring the land with “significant inherent values” (*Crown Pastoral Land Act*, 1998, §24(b)) for conservation, recreation, heritage, and landscape to “full Crown ownership and control” (*Crown Pastoral Land Act*, 1998, §24(b)(ii)) to be managed as parks or reserves by the Department of Conservation. In other words, the campaign for land reform has been successful in New Zealand, but not in the US.

What are pastoral leases?

Pastoral leases are contractual agreements between the Crown as lessor and the lessee, granted by the Commissioner of Crown Lands under section 66 of the Land Act of 1948. The leased land is a type of Crown land classified as “pastoral”, or "land that is suitable or adaptable primarily for pastoral purposes only." (*Land Act*, 1948, §51(1)(d) (Later amended and repealed by CPLA §104)) Crown land is "vested in her Majesty which is not for the time being set aside for any public purpose or held by any person in fee simple." (*Land Act*, 1948, §2) In other words, it is neither reserved for a specific purpose with a public access, nor private property. With numerous amendments, including the CPLA of 1998, the Land Act still governs pastoral leases.

Brooker’s Land Law defines a lease as: “an estate in land. It may exist at law or in equity. It arises when one party, the lessor (or landlord), confers on another party, the lessee (or tenant), the right to the exclusive possession of certain land for a period which is subject to a definite limit. … Leases exhibit both proprietary and contractual characteristics. The common law originally recognized the arrangements from which they sprang as merely contractual, but gradually acknowledged the lessee’s rights to the land which was the subject of the contract, recognizing, through the remedies available, that the lessee had rights in rem.” (Brookers Looseleaf Legal Service, 1995, para. 11.1.01)

Pastoral leases administer the distribution of usufructuary property rights among the leaseholder and the Crown, while the CPLA governs the redistribution of property rights in land tenure reform. If we consider the pastoral leases as a bundle of sticks, each representing a separate usufructuary property right (or use right), the farmer holds the rights to

pasturage, perpetual right of renewal,[19] exclusive occupation, and ownership of physical "improvements" to land (Brookers Looseleaf Legal Service, 1995, para. 11.23.02); and the Crown holds the rights to soil, water, minerals, and all land uses other than pastoralism (Commissioner of Crown Lands, 1994, p. 12). The right to exclusive occupation confers upon the farmer the right to exclude trespassers, including recreationists. In that sense, then, the farmer holds the sticks for recreation access, pastoral use, and sale/transfer/bequest in the property rights bundle. And the Crown holds the rights to all uses except pastoralism (subdivision, viticulture, venison farming, ski resorts, soil disturbance, mining, etc.).

The lessee's right of exclusive occupation is an important legal right, as it allows him/her to keep others off the property.

> The House of Lords, in *Steet v Mountford* [1985] AC 809 adopted the approach that … a grant of exclusive possession was of prime importance. Their Lordships [cite] the now classic passage from the judgement of Windeyer J., at p 222: "What then is a fundamental right which a tenant has which distinguishes his position from that of a licensee? It is an interest in land distinct from a personal permission to enter the land and use it for some stipuated purpose. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land. … A legal right of exclusive possession is a tenancy, and the creation of such a right is a demise. … A right of exclusive possession is secured by the right or a lessee to maintain ejectment and, after his entry, trespass. (Brookers Looseleaf Legal Service, 1995, para.11.3.04)

Exclusive occupation is perhaps more important socially than legally, as it conveys a perception of outright ownership.

Pastoral leases run for 33 years, and are renewable in perpetuity (*Land Act*, 1948, §66(2), repealed and replaced by CPLA §4(b)). These leases are also fully transferable by sale, gift, or inheritance, contingent on consent of the

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[19] It should be noted that a perpetually renewable lease is different from a lease in perpetuity, which is prohibited in Common Law. "Truly perpetual leases are not recognized by the common law. … An attempt to grant such a lease would result in either the grant of tenancy under s 105 Property Law Act 1952, … or the grant of a fee simple subject to the payment of an annual rent charge in perpetuity. … The phrase "perpetual lease" is regularly used to refer to perpetually renewable pastoral leases (and licenses) of Crown Land, granted under thte Land Act 1948 (1948 No 64)."Brookers Looseleaf Legal Service, "Land Law," ed. Andrew Alston (Wellington, NZ: Brookers, 1995), para, 11-61.

Commissioner (*Land Act*, 1948, §93(1)). Even Canadian pop star Shania Twain bought two pastoral leases near Queenstown, New Zealand in 2004.[20]

Currently there are about 273[21] pastoral leases remaining on the eastern slope of the southern Alps. As of February 2005, 66 leases had completed the reform, 154 were in process, and 119 had acted on the voluntary nature of reforms and chosen not to enter the process. The leases range in size from 1000 ha to 16,000 ha, with an average of 7000 ha (Cabinet Policy Committee, 2005, p. 7). The pastoral estate supports about 2.8 million stock units, or about 4% of the total stock in New Zealand. And pastoral land produces a large portion of New Zealand's "extra fine" Merino wool. The land is quite varied in its pastoral productive capabilities, from the highly productive low lands up to land above 2000m in altitude with little to no productive capacity (Commissioner of Crown Lands, 1994, p. 11).

Table 2: Timeline of Land Tenure Reform in New Zealand

1840	Treaty of Waitangi establishes NZ as a colony of Britain
1844-1864	Crown purchases much of the South Island high country from Maori (Ngai Tahu) cited in (Brookers Looseleaf Legal Service, 1995, para.11.22.01)
1856-1858	grazing leases established on South Island (Commissioner of Crown Lands, 1994) cited in (Brookers Looseleaf Legal Service, 1995, para.11.22.02) -- pastoral licenses for 1 year in Canterbury and 14 years in Otago (Broad, no date)
1948	Land Act passes, grants 33 year pastoral leases, renewable in perpetuity. Leases are fully transferable with Crown permission, and offer exclusive right of occupation, and right of pasturage (and other non-pastoral uses with Crown consent)
1948-	Farmers sporadically advocate for right to convert lease land to freehold

[20] see for example: Staff, "Twain Purchase Rumour a Worry `Come on over' Invitation Unlikely," *Otago Daily Times*, 4 May 2003 2003, Staff, "Twain Sale, Tenure Issues Highlighted " *Otago Daily Times*, 17 September 2004 2004, Neal Wallace, "An Expert Says Increasing Public Access to Private Land Will Impact on Farm Productivity. Public Access Could Hit Farm Wealth, Says Expert " *Otago Daily Times*, 4 November 2004 2004, Neal Wallace and Sally Rae, "High Country Sale Has Raised Expectations: Mp Sale More Than Twice Market Rate, Land Agents Say " *Otago Daily Times* 27 January 2004 2004. Mike Crean, "Twain's Track Is for Walkin'," *The Press*, 25 SEP 2004 2004.

[21] As of 7 Feb., 2005, there were 273, though with ongoing land reform, the number of leases is diminishing by the month. Cabinet Policy Committee, "Pol(05)14," 1.. For the latest update on numbers, see http://www.linz.govt.nz/rcs/linz/pub/web/root/core/CrownProperty/tractivitygraph/index.jsp

[23] Harry Broad, "The Changing Role of Government in the Management of Its High Country Lands," (Wellington: Victoria University of Wellington Public Policy Department, no date).

1992	
1977	Reserves Act passes, conveying perception of preservation as a legitimate land use[23]
Early 1980s	Introduction of lucrative helicopter based deer hunting inspires leaseholders to exclude non-paying deerstalkers, who had traditionally enjoyed free hunting access with permission
1982	Clayton report recommends freeholding productive pastoral land to boost productivity, while retaining some land for conservation
1982	Federated Mountain Clubs (FMC) takes up deerstalkers' cause, launching Campaign for Change in pastoral lease tenure. FMC forms Public Land Coalition with the Royal Society for Protection of Forest and Bird,[24] Public Access NZ, and Acclimatisation Societies (later to become Fish and Game Councils of NZ).
1984	4th Labour government elected. State sector reforms based in neoliberal ideologies and public choice administrative model of New Public Management introduced.
1987	NZ Forest Service disestablished. Dept of Lands and Survey, administrators of leases, disestablished. Dept of Lands established Dept of Survey and Land Information established (DOSLI) Dept of Conservation (DOC) established, to manage about 30% of NZ LandCorp, a state owned enterprise established ownership of pastoral leases passes to Dept of Lands administration of pastoral leases passes to LandCorp
1990	Dept of Lands folds into Dept of Land and Survey Information
1992	representatives from DOSLI and LandCorp devise an administrative process to reform land tenure under the Land Act.
1995	Crown Pastoral Land Bill introduced to Parliament by Minister of Lands and Conservation (2 separate offices) Dennis Marshall
1996	DOSLI becomes Land Information New Zealand (LINZ)
1998	CPLA passes, after 34 leases have undergone tenure review under the Land Act administrative process.
Feb. 2005	64 Leases have undergone tenure review 38%, or 109,513 hectares have returned to full Crown ownership under DOC 62%, or 178,288 hectares have been conveyed to farmers as freehold.
June 30, 2005	Crown has paid farmers total of NZ$15.5 million in equalization payments since 1998.

Beginning of the end of NZ pastoral leases and US federal lands?

Instigated by Nevada state senator Dean Rhodes and ranchers in the American West, the Sagebrush Rebellion sought to transfer authority over federal lands to the state governments.[25] The Rebellion gained sporadic

[24] somewhat akin in prominence and worldview to the US Sierra Club

[25] the definitive authority on the Sagebrush Rebellion is R. McGreggor Cawley, *Federal Land, Western Anger : The Sagebrush Rebellion and Environmental Politics*

support from some of the states, and even then-Presidential candidate Reagan famously declared his sympathy in a 1980 campaign speech.[26] But Democratic members of Congress opposed the Rebellion, citing the Constitution and other legal barriers to implementing the sought-after reforms.[27] And even more than 20 years later, environmental groups still declare their staunch opposition to the Rebellion.[28] By contrast, the push for reform of New Zealand's pastoral leases came from all sectors – institutional and administrative momentum, as well as political pressure from all interest groups.

NZ Institutional Reforms

For the Commissioner of Crown Lands and the Minister of Lands, the 1980s was a decade political pressure from all sides for tenure reform, and a decade of state sector reforms inspired by neoliberal precepts of governance.[29] In the field of natural resources, these reforms meant the end of the NZ's subscription to the multiple use paradigm which has dominated the

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(Lawrence, Kan.: University Press of Kansas, 1993). See also a nice brief description by the University of Nevada Archives at http://www.library.unr.edu/specoll/mss/85-04.html, last checked 30 October, 2005.

[26] Reagan declared "I am a Sagebrush Rebel" in Salt Lake City, Utah, in August 1980. See the Property Rights Foundation of America, Inc. for a description. (http://www.prfamerica.org/FedLandownership.html)

[27] see for example a letter from Rep. Morris Udall to his constituents supporting retention federal ownership of federal land. Morris Udall, *The "Sagebrush Rebellion": A Report from Mo Udall, 2nd Congressional District of Arizona, Volume Xvii, Number 4, October 1979* (University of Arizona Library Archives, 1979 [cited 30 October 2005]); available from http://dizzy.library.arizona.edu/branches/spc/udall/congrept/96th/7910.html.

[28] For example, Robert F. Kennedy, sometime spokesperson for the Natural Resources Defense Council, describes the Rebellion as follows in Rolling Stone magazine: "The Sagebrush Rebellion [was] a coalition of industry money and right-wing ideologues that helped elect Reagan president. The big polluters who started the Sagebrush Rebellion were successful because they managed to broaden their constituency with anti-regulatory, anti-labor and anti-environmental rhetoric that had great appeal both among Christian fundamentalist leaders such as Jerry Falwell and Pat Robertson, and in certain Western communities where hostility to government is deeply rooted. Big polluters found that they could organize this discontent into a potent political force that possessed the two ingredients of power in American democracy: money and intensity." Robert F. Kennedy, Jr., "Crimes against Nature," *Rolling Stone* 2003.

[29] for more on the 1980s reforms in NZ, see Jonathan Boston, *Public Management : The New Zealand Model* (Auckland, N.Z.: Oxford University Press, 1996)..

And for the role of neoliberal precepts in the reforms, see Shaun Goldfinch, "Paradigms, Economic Ideas and Institutions in Economic Restructuring: The Case of New Zealand," *Political Science* 52, no. 1 (2000).

Finally, for more specifics on the reforms in the environmental sector, see Ton Bührs and Robert V. Bartlett, *Environmental Policy in New Zealand : The Politics of Clean and Green?* (Auckland ; New York: Oxford University Press, 1993).

US public lands since 1960 passage of the Multiple Use and Sustained Yield Act for the National Forests, and 1976 passage of the Federal Land Policy and Management Act for BLM lands.

The 1980s reforms in NZ shifted land title to the private sector for productive forest land where there was considered to be little public interest (Broad, no date, p. 47); and centralized authority over land where conservation and recreation values were considered high into the Department of Conservation (DOC), created in 1987.[30] On a broader level, outside of natural resources, the 1980s witnessed growing discomfort with the New Zealand government owning productive assets that could be managed by the market.[31]

Even before the 1984 election of the Fourth Labour government which "out-Thatchered Thatcher and out-Reaganed Reagan" (Freedland, 2000), there was widespread dissatisfaction with the multiple use paradigm – among agency officials and conservation advocacy groups who were growing in importance. According the Andy Kirkland, former director general of the NZ Forest Service, "the highest attainable goal for managers under [multiple use] is a state of moderate dissatisfaction among all client groups."[32] And the conservation groups, led by the charismatic Guy Salmon, were pressing for the creation of a central conservation agency and an end to multiple use, which the early Kiwi environmentalists called "multiple abuse," (Pawson and Brooking, 2002; Young, 2004) and "state-sponsored vandalism" (Buhrs, 2000, p. 33).

In 1987, the 4th Labour government dissolved the NZ Forest Service, with some of its land being corporatized and later privatized, and the

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[30] see generally Bührs and Bartlett, *Environmental Policy in New Zealand : The Politics of Clean and Green,* David Young, *Our Islands, Our Selves : A History of Conservation in New Zealand* (Dunedin, N.Z.: University of Otago Press, 2004).

[31] "They promptly dumped every economic principle that had once been Labour holy writ. The party converted to the free market with a zeal that out-Thatchered Thatcher and out-Reaganed Reagan. If it moved, Labour and its finance minister Roger Douglas privatised it. Taxes were slashed, workers' protection binned. New Zealand became the citadel of the new right." Jonathan Freedland, "The Future Is Kiwi: New Labour in Power, Special Report," *The Guardian*, Wednesday May 3 2000.

[32] Andy Kirkland, "Forestry, a Multiple Use Enterprise" (paper presented at the Proceedings of the 13th Forestry Conference, Rotorua, 1989). cited in Broad, "The Changing Role of Government in the Management of Its High Country Lands."

remaining transferred into the newly formed DOC (Birchfield and Grant, 1993; McIntyre, et al., 2001). The government also disbanded another multiple use agency, the Department of Lands and Survey, and shifted responsibility for New Zealand's Reserves and National Parks to DOC.

The pastoral leases did not participate in the privatization boom of the 1980s, as their fragile ecological state and iconic cultural values justified retaining them in Crown ownership.[33] The responsibility for the pastoral leases was divided into surviving remnants of the old Department of Lands and Survey. Administration of the leases was delegated to the newly formed state-owned enterprise, LandCorp, while ownership of the land itself was delegated to Department of Survey and Land Information (DOSLI), which eventually turned into LINZ (Broad, no date, pp. 43, 16).[34]

Lastly, in 1991, Parliament passed the Resource Management Act, a comprehensive urban and environmental planning statute which authorized newly created District and Regional Councils to create 10 year land use plans that would be effects-based, and would adhere to the principles of sustainable development (*Resource Management Act*, 1991, §30). After a decade of centralizing authority over many conservation values into the new Department of Conservation, the RMA decentralized authority over environmental protection and sustainable development on private land. Passage of RMA created further support for land reform among conservation-minded Members of Parliament, as there was some feeling that the RMA would be more effective at achieving ecological sustainability than the Land Act, which does not mention conservation (Broad, no date, p. 44).

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[33] According to the Commissioner of Crown Lands, "it was recognized fairly early that the high country leases had an iconic value which would be more controversial politically, so they were not freeholded as easily or as frequently under the Land Act."

[34] According to the last Director General of the now-defunct Department of Lands and Survey, a huge political debate about the future of pastoral leases followed the split up of the department. The debate was led by Forest and Bird, FMC, Public Access New Zealand. These groups very strongly advocated that pastoral leases should not be given to LandCorp, because they contained vast areas of high conservation/recreation values, and most of the land was not farmed anyway. "The farmers went out of their tree on this one." The government in 1987 was conservation-oriented, so would not listen to anything but the conservation viewpoint. They put the administration of pastoral leases with LandCorp, but did not give the ownership of the leases to land Corp. Thus they separated the management and administration of pastoral leases from the ownership of the land.

1980s: Push for tenure reform from all sides

Though the government did not privatise and divide pastoral lands at the same time as the national forests,[35] the Minister of Lands did respond to pressure from farming, recreation, and conservation groups as well as the new model of governance that swept into New Zealand in the 1980s.[36] By the 1980s, many high country farmers had been lobbying the government for the right to convert their leases to freehold for decades.[37] In 1982, the government-commissioned Clayton Commission of Inquiry into the Pastoral Leases found that the pastoral leases' restrictions were causing severe underdevelopment of the pastoral estate (Brookers Looseleaf Legal Service, 1995, para.11.22.02). The Commission recommended large-scale freeholding of pastoral land in order to use diversification as a management strategy to promote pest control, productive farming, and grassland health (Hayman, 2003). And when the leases were transferred to the state-owned commercial enterprise LandCorp in 1987, farmers saw an opportunity to push for freehold.[38] So by the late 1980s "the High Country Committee of Federated Farmers was rocking the boat strongly … for freehold."[39] Then in 1994, the Working Party on Sustainable Land Management (dubbed the Martin Report) recommended reforming pastoral land legislation "with the object of freeholding all the land not required by the Crown for the public interest," with the assumption that granting freehold would allow the farmers to use land more sustainably.[40]

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[35] the 4th Labour government did propose a new Land Act in 1989, but it was lost in the shuffle at the end of massive reforms, and went nowhere Broad, "The Changing Role of Government in the Management of Its High Country Lands," 43..

[36] According to a former Director General of the Department of Lands and Survey, land tenure reform is not related to the New Zealand Forest Service split up. But "it is result of that 1984-87 reforms, with the Crown getting out of the business of administering leases" (and resource development).

[37] But according to the former Director General of Department of Lands and Survey, not all farmers stood behind reform efforts as some thought reform efforts would open a Pandora's box which might lead to the lessees losing everything.

[38] Interview with former Director General, Department of Lands and Survey

[39] Ibid.

[40] Martin report as quoted and described in Brookers Looseleaf Legal Service, "Land Law," 11.22.02.

Recreation – conservation join crusade for land reform

But land tenure reform was not spawned by farmers alone. The recreation and conservation interest groups gained momentum after the 1977 passage of the Reserves Act, which conveyed a perception that preservation was a legitimate use of Crown lands.[41] And in the early 1980s, the recreation and conservation groups joined in the crusade for land tenure reform, though from a very different angle from the farmers. Just as the government grew uncomfortable with state ownership of productive resources in the 1980s, in the late 1970s and 1980s conservation groups began to question lessees' right to determine high country land use as well as their ability to protect native species and provide reliable recreation access.[42] Indeed the proposal for tenure review in its current form was first put forth by the "greenies," the recreation-conservation groups.[43]

However the two groups had very different ideas of the desired outcomes of reform – some farmers pushed to convert entire leases to freehold, while recreation and conservation groups worked in parallel to resume parts of leases to convert them from Crown land to public reserves.[44]

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[41] Broad, "The Changing Role of Government in the Management of Its High Country Lands."

[42] For a sample of FMC's discomfort, see: Hugh Barr, "Freeholding Pastoral Leases," *Federated Mountain Clubs Bulletin*, March 1982..

And the Forest and Bird magazine chronicles the group's long-standing efforts to amend land tenure patterns in the high country in the following article: Eugenie Sage, "The Big Steal," *Forest and Bird*, August 1995..

Finally, former adviser to Minister of Lands Dennis Marshall and current DOC staffer describes the rec-cons questions in Broad, "The Changing Role of Government in the Management of Its High Country Lands.".

[43] Interview with former Director General, Department of Lands and Survey

[44] According to former Director General of Department of Lands and Survey, "tenure review as you have it now was instigated by the greeny recreation groups. The right to freehold was definitely instigated by the farmers, but tenure reform was the idea of the recreation/conservation groups." Some farmers were talking about freeholding everything, but the greenies never talked of presuming entire leases, just reviewing each property individually. The two groups were lobbying in parallel, but not simultaneously, and the whole thing went in bursts. When one side would raise the issue, the other would react. When farmers raise the issue, the greenies would be alerted by the minister of conservation for a response. But the farmers were not alerted by the minister of lands. So it did not work the other way around. The minister of conservation had only one job, to look after the recreation and conservation interest." (Interview with former Director General, Department of Lands and Survey)

But some farmers, though not all, had been pushing for the right to freehold their entire lease, while no recreation-conservation advocate lobbying to reserve an entire lease. (Interview with former Director General, Department of Lands and Survey)

According to Stone (Stone, 2001), ambiguity of goals is essential to garner widespread political support for a policy. In this case, there were two camps with very different agendae simultaneously advocating for the same policy. Because the land reform policy idea had both conservation-recreation and freehold goals, each group could claim a victory and each could find reason to support it.

Lack of Recreation Access Sparks Support for Reform

Why did the recreation and conservation groups support reform? Though farmers had been advocating economic efficiency, and the conservation groups advocated ecological integrity, recreation access proved to be a powerful political catalyst for reform.[45] Some elements of the recreation community had long been concerned that so much high elevation land with recreation potential was off-limits to recreationists, and the “Deer Wars” of the 1970s and 1980s sparked action on the issue of recreation access to the South Island high country.[46]

Traditionally, the deerstalkers had been very welcome on runs, as they were providing somewhat of a service removing pests. But as live deer became valuable for farming, the deerstalkers were no longer welcome. Suddenly with helicopters and cheaper air travel, hunters could ship meat off to Germany quickly, easily, and profitably; and live capture of deer for domestic venison farming became very profitable. These professional helicopter hunters were willing to pay for hunting access to leased land, while private deerstalkers were accustomed to access gratis, though by permission. In 1980, one deer was worth about $2000 for live recovery. When deer became profitable, lessees were not as happy to allow nonpaying private deerstalkers on their runs as they had been traditonally. The limited access for hunting and huge drop-off in deer population "made life hectic for the poor deerstalkers."[47] At that point, prominent members of the Federated Mountain Clubs (FMC) became very keen on making lease land more public in order to

[45] Interview with NZ Deerstalkers Association advocate.
[46] Interview with Patron, Federated Mountain Clubs
[47] Interview with NZ Deerstalkers Association advocate

secure public recreation access.[48] The NZ Deerstalkers Association worked extensively with FMC, who in turn started a campaign for more access because "it's no good having land if you can't get to it."[49]

The Deer Wars and aftermath brought the issue of access to pastoral leases to the fore, and further raised questions of property rights in Crown land. The land is owned by the Crown, with certain rights – including recreation access – leased, or alienated, to the leaseholder. But the deerstalkers raised the issue of the public-ness of Crown lands. The weighty Federated Mountain Clubs (FMC)[50] joined ranks with the deerstalkers, and brought the Royal Society for the Protection of Forest and Bird[51] and the Acclimatization Societies (which became the Fish and Game Councils of New Zealand) with them. These recreation and conservation interest groups formally allied themselves in 1984[52] into the Public Lands Coalition,[53] and launched a campaign for change.[54] The Coalition sought to restore public access to pastoral leases by returning the land above 1000m into full Crown

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[48] Interview with NZ Deerstalkers Association advocate

[49] Interview with Patron, Federated Mountain Clubs

[50] FMC has about 12,000 members, according to an FMC brochure (http://otmc.co.nz/fmc.html, last visited 30 October, 2005)

[51] Forest and Bird has over 40,000 members (http://www.forestandbird.org.nz/aboutus/index.asp, last visited 30 October, 2005)

[52] also in 1984, conservation and recreation groups were successful and securing a seat for themselves on the Land Settlement Board, the advisory committee to Department of Lands and Survey that had previously comprised only farmers. But the Board was disestablished soon after "greenies" were invited. (Interview with former Director General, Department of Lands and Survey)

[53] Over the years, the coalition's name has changed several times from Public Lands Coalition to High Country Public Lands Coalition, to High Country Coalition (Interview with NZ Deerstalkers Association advocate). Its current incarnation, the High Country Coalition, became active again in 2001 when tenure review began again in earnest after a post CPLA lull.

[54] The campaign for change was launched at FMC's annual meeting in 1982, when members passed a resolution calling for the government to reserve all land in pastoral leases above 1000 m for conservation. Although the groups operated in coalition, there were some philosophical differences. FMC saw the exclusive nature of pastoral leases as damaging to the public access aspect of the recreation resource, while Forest and Bird saw high elevation grazing as ecologically damaging first and foremost (interview with former Executive Board member, FMC). For more history on FMC's long-standing support for land tenure reform, see: A. Evans, "Unalienated Crown Land," *Federated Mountain Clubs Bulletin*, September 1979, David Henson, "F.M.C. Seminar: The Future of Pastoral Leasehold Lands," *Federated Mountain Clubs Bulletin*, June 1983, David Henson, "Pastoral Leases -- Land Settlement Board's Resolution Inadequate " *Federated Mountain Clubs Bulletin*, September 1983, David Henson, "Pastoral Lands -- F.M.C. Urges Government Action," *Federated Mountain Clubs Bulletin*, June 1985.

ownership, while allowing continued farming on the low altitude land.[55] In short, the “greenies” sought to make the high elevation Crown lands more public.

Administrative lead-up to tenure review

Finally, in addition to the political pressure for separation of production and conservation and political pressure from farmers and the recreation and conservation lobbies, the Department of Lands and Survey and the Land Settlement Boards had been dabbling in the idea of divesting of pastoral leases from the 1970s through the 1990s.[56] This administrative lead-up to land reform established the precedent for separating pastoral lease property interests among the Crown and the lessee, and laid the foundation for a redistribution process built on consultation with interested parties.

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[55] According to NZ Deerstalkers Association advocate, FMC and coalition members saw the inclusion of high elevation land in the pastoral leases as an historical accident. As surveying and fencing were often prohibitively expensive in the mid-19th century when the leases were very first established in an earlier form, pastoral leases came to include the entire slope rather than just the more productive low altitude land. It was easier to divide land by ridges and rivers, rather than carefully demarcated zones of high and low productivity.

[56] According to interviews with a LINZ contractor, and Commissioner of Crown Lands, and Tenure Review Manager in Christchurch (see also Broad, "The Changing Role of Government in the Management of Its High Country Lands.")

Reclassification of land from pastoral to the farm class (and hence convertible to freehold) had been happening to some degree since pastoral lease establishment in 1948, but only in the farms of lower elevation. In 1948, the government issued about 1000 pastoral leases, with about 400 in the high country and about 600 in lower country. Between 1948 and 1982, many of the lower elevation farms reclassified and converted to freehold.

And in 1985, the Land Settlement Board made another attempt at tenure review which was again aborted. It issued a reclassification policy by which parts of the pastoral leases could be transferred to freehold, with parts retained for the Crown. This policy involved a more extensive consultation process than the trial balloon launched in 1982. DLS did not have the resources to carry out the consultation or implement the policy, so the Commissioner of Crown Lands "pulled the pin on the project."

On top of this was the Protected Natural Areas program, which sought to identify lands which were deemed to be in the community's interest to protect for biological, ecological, or aesthetic values. Between 1987 and 1990, DOC acquired a few areas in Otago and Southland but "not a lot". But these PNA acquisitions represent the first successful attempts at land tenure reform.

[64] The RLMP grew out of a 1988 Report of the Rabbit and Land Management Task Force to the Minister of Agriculture, Rt. Hon. C.J. Moyle.

Land tenure reform got "kick started" under the Rabbit and Land Management Program (RLMP).[64] By the late 1980s, the rabbits in the South Island high country were so abundant, that they were causing desertification in the drier areas of Central Otago.[65] The Rabbit and Land Management Task Force and subsequent program were established to identify why rabbits were such a problem in the first place.[66] Taking a systems approach to rabbits, the Task Force director (currently the Parliamentary Commissioner for the Environment) characterized the land problem as "not about the kindest way to kill a rabbit. It is about how we prevent the death of a fragile piece of New Zealand. We will leave future generations the corpse of an entire region if we continue to argue about which painkiller to use on a near-terminal patient."[67]

The Task Force concluded that the pastoral system of tenure was at least partly to blame – that the constraints of pastoralism forced lessees into low-intensity farming which produced prime rabbit habitat. According to the former director: "at one point, [a colleague] and I looked at the land and said 'if this were in vineyards, there wouldn't be a rabbit here.'" The Task Force concluded that intensification and diversification of land use would mitigate the rabbit problem in two ways: 1) by changing the habitat to a more fertile, productive landscape in which rabbits do not compete as well; 2) by increasing the return on the land and hence allowing more capital to flow into rabbit and pest control.

The first lease to undergo reform was Mt Difficulty Station,[68] whose lessee was part of the RLMP, and volunteered his station to be a "test case" of tenure reform.[69] According to the Director of RLMP: "The Mt Difficulty tenure review was sort of a natural progression that came out of the idea that we needed to deal with tenure. There was a fair bit of nervousness, of caution, and opposition among the farming community." But some farmers

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[65] RLM Task Force Report to Rt Hon. C.J. Moyle, Min Agriculture. Sept. 1998. p 1

[66] interview with current Parliamentary Commissioner for the Environment, former Director of the Rabbit Land Management Programme (1989 – 1995).

[67] Broad, "The Changing Role of Government in the Management of Its High Country Lands," 12. quoting Director of the Rabbit Land Management Programme, Morgan Williams

[68] The review was conducted on part of Mt Difficulty Station in the Central Otago district between 1990 and 1993. See Figure 3.

[69] In a side note, part of the land from that inaugural tenure review is now part of the Felton Road vineyard near Bannockburn. See Figure 3.

saw it as a feasible (read affordable) way to freehold parts of the property. If a lease had conservation values to trade, then the farmer could attain freehold without producing the capital that would otherwise be necessary.[70]

This Mt Difficulty test case sparked both land tenure reform, and, indirectly, the viticulture industry in the Bannockburn area of Central Otago.[71] It resulted in some pastoral land being converted to freehold in exchange for some land being resumed for conservation in a Protected Natural Area. But in the end, part of the original station was still retained in the lease. And the internal process of the Mt Difficulty process closely resembled the modern process.[72]

In sum, the pressure for land tenure reform came from all sides – farming, recreation, conservation, administration, and government ideology – though the various sides each had their own reasons for supporting reform. And each faction had its own reasons for concern about reform. And these reasons were often quite contradictory – a recreation advocate might want free recreation access, while the lessee wants to launch a private safari park.

The interest group landscape resembles Rudyard Kipling's ideal of "If all men count with you – but none too much."[73] Thanks to the multiple and ambiguous policy goals, regardless of underlying motivation, the end result is the same – each party wants reform as each party has something to gain. With some particularistic exceptions, this remains true today: the land reform effort has "got no one against us."[74] Each of the interest groups supports tenure review in principle,[75] even if some have concerns about the process or results.[76] And the vested interests show their support for the process by

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[70] interview with current Parliamentary Commissioner for the Environment, former Director of the Rabbit Land Management Programme (1989 – 1995).

[71] interview with current Parliamentary Commissioner for the Environment, former Director of the Rabbit Land Management Programme (1989 – 1995).

[72] According to a contractor, the initial proposal was publicly advertised for comment, submissions received, and public consultations conducted.

[73] Rudyard Kipling, *If* (London: Macmillan and company, ltd., 1914).

[74] Interview with Patron, Federated Mountain Clubs

[75] Interviews with Forest and Bird staff, FMC pastoral lands convener, Patron of Federated Mountain Clubs

[76] Interviews with landscape advocate, Forest and Bird staff, recreation advocate

continuing[77] to enter and complete negotiations that are entirely voluntary for the lessees.[78]

The idea for land tenure reform enjoyed widespread support because the current property rights arrangements made it such that both sides have something to gain from the other. The farmer got freehold title to productive land on which he or she may diversify land use and expand out of sheep farming. Recreation and conservation interests got recreation access to, and protection from grazing, for vast swathes of spectacular high country landscape.[79] According to the Conservation Director of Forest and Bird: "Both recreation/conservation and farming saw the benefits of splitting the uses … You gotta remember that this came in under a National government.[80] They are the farmers' party. There's no way that National would pass a bill that the farmer saw as unfavorable. It's clear in the parliamentary debate in Hansard's that, at the time, all sides saw it as win-win."

Land tenure reform under the Land Act: 1991 – 1998

In response to political pressure, and administrative and institutional momentum, in 1991 the Commissioner of Crown Lands directed staff from DOSLI and LandCorp to develop an administrative process of land tenure reform. The period from 1992-1998 is referred to as a "trial period" in land tenure reform.[81] While first seen by some as "a bit of a dog's breakfast,"[82] the process was evolving, formalizing, and gaining more steps.[83]

As an administrative process, early land tenure reform was *ultra vires*, or extra-legal, as it lacked specific statutory authority (Broad, no date, p. 47).

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[77] according to LINZ, as of 30 September, 2005, 67% of high country lessees have entered or completed reviews (characterized in a graph published by LINZ on the Web, title, Crown Pastoral Lease Tenure Review Activity as at 30 September, 2005: found at http://www.LINZ.govt.nz/rcs/LINZ/pub/web/root/core/CrownProperty/tractivitygraph/index.jsp, last visited 30 October, 2005

[78] CPLA 1998 ss27,28. and Land Information New Zealand, "Government Objectives for the South Island High Country: Report Back to the Chair, Cabinet Policy Committee (Office of the Minister for Land Information, Office of the Minister of Conservation, Office of the Minister of Agriculture and for Rural Affairs)," (Wellington, NZ: 2003).

[79] See Figure 4.

[80] This is the center-right political party of NZ, as opposed to the center-left Labour party.

[81] Interview with LINZ contractor.

[82] Interview with Fish and Game Councils of NZ staff. This is not necessarily a derogatory term, just means a mish-mosh, you never know what you'll get.

[83] Interview with former chair of the High Country Committee, Federated Farmers.

According a former president of the High Country Committee of the Federated Farmers: “Under the old Land Act, it wasn't clear whether the process was legal. The Crown and lessees feared judicial review, so the Crown put a lot of effort into getting outcomes that were acceptable to all. The only real objective was to get out of pastoral leasing, so they came up with a process that all could be happy with."[84]

During this period, 34 leases completed the reform process. According to a newspaper account:

> “About 40 per cent of the more ecologically fragile and less- productive land was kept for conservation and contributed to Canterbury's first high-country conservation park, the 22,000 hectare Korowai-Torlesse, established in 2001.
>
> The newly freeholded farmers, meanwhile, diversified with a vengeance. One set up a lucrative tyre-testing strip, another the Cardrona ski-field.
>
> But the Land Act was never designed to consider such changes. The process was unwieldy and in- house with little or no public input. In 1998, the Government introduced the Crown Pastoral Land Act allowing the current review of all the high-country leases.” (Hayman, 2003)

The End of the Road: Introduction of the Crown Pastoral Land Bill

In 1995, Dennis Marshall, then the Minister of Lands and Conservation (separate offices), moved to give statutory authority to the land tenure reform process.[85] With some ado,[86] Parliament signed the Crown Pastoral Land Act (CPLA) into law in 1998, with a party-line vote under a center-right led government led by the National Party.

The CPLA aims to "establish a system for reviewing the tenure of Crown lands held under certain perpetually renewable leases." (Land

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[84] Interview with former chair of the High Country Committee, Federated Farmers.
[85] Interview with DOC tenure review manager, Canterbury.
[86] For media coverage of the bill’s passage, see for example: Allan Evans, "Why Conservationists Object to High-Country Land Law Changes," *The Press*, 1995 Mar. 24 1995, Denis. Marshall, "Law Change Needed to Manage and Protect the High Country," *The Press*, 1995 Mar. 23 1995, Staff, "High Country `under Threat'," *The Press*, 1995 June 15 1995, Staff, "Owning the High Country," *The Press*, 1995 Apr. 8 1995, Staff, "Govt to Freehold High Country," *The Press*, 1995 Mar. 10 1995, Staff, "Land Act Campaign May Be Mounted," *The Press*, 1995 Apr. 1 1995, Staff, "Crown Lease Legislation Worries Landscape Architects," *The Press*, 1996 Feb. 1 1996.

Information New Zealand, 1998, p 4) It sets four goals for land tenure reform (*Crown Pastoral Land Act*, 1998, §24):

> 1) "to promote the management of reviewable land in a way that is ecologically sustainable;
> 2) “subject to [above], enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instruments;
> 3) “to enable the protection of the significant inherent values of reviewable land – by the creation of protective mechanisms, or (preferably) by the restoration of the land concerned to full Crown ownership and control.
> 4) “subject to [above], to make easier the securing of public access to and enjoyment of reviewable land; and the freehold disposal of reviewable land."

In other words, the land reform process guided by CPLA aims to change land use patterns in two ways: 1) by freeing land capable of commercial use from the constraints of the Crown lease by conveying freehold title to the formal leaseholder; 2) by protecting significant inherent values (recreation, conservation, historical, cultural, ecological …) in one of two ways -- creating a legal covenant[87] over newly freeholded land or, preferably, resuming the land into full Crown ownership. Between 1992 and June 2005, about 229,652 hectares (or 42%) converted to freehold and about 165,446 hectares[88] (or 58%) returned to full Crown ownership (Cabinet Policy Committee, 2005, p. 3).

Discussion and Conclusion

This chapter compares the Sagebrush Rebellion and New Zealand land tenure reform, and asks why one succeeded and the other did not. New Zealand farmers succeeded in their campaign for devolution of authority over land to the farmer, while American ranchers failed in their attempt to transfer title over federal lands to the states. The New Zealand reforms had endemic momentum from three sources: the institutional reforms of the 1980s; administrative lead-up to land reforms; and political pressure from all sectors in support of land reform. The Sagebrush Rebels lacked institutional and

[87] Called a conservation easement in the US.
[88] For statisticians, these two categories yield a p-value of 0.075 in a 2-tailed t test.

administrative momentum, and stood against the Constitutional prohibition on state laws contravening and superceding federal law (Udall, 1979).

In addition to institutional momentum, this chapter reveals key differences in the political alignments of interest groups, and property rights arrangements in NZ pastoral leases vs US grazing permits. In New Zealand, the farmers, recreation groups and conservation groups all supported the reforms; while in the US the conservation and recreation groups were dead-set against the Sagebrush Rebels' campaign. Why? Because the property rights arrangements created in the (NZ) Land Act of 1948 were far more favourable to the farmer and less favourable to the would-be recreationist than those created by the US Taylor Grazing Act of 1934 and US public land case law. NZ Pastoral leases allow the lessee to exclude trespassers, including recreational hikers, backpackers, and hunters,[89] while US grazing permits do not.[90] This exclusion of "deer-stalkers" sparked the Deer Wars of the 1970s and '80s, and rallied support for land reform among deerstalkers, and their friends in the powerful recreation and conservation lobbies. In other words, property rights arrangements elicited support for NZ land reform from all quarters – farmers, conservation, and recreation. While in the US, ranchers were joined in their campaign only by those from their end of the political spectrum.

[89] See chapter 4

[90] see the Supreme Court cases regarding fencing on public land (especially Light v US, 1911 (as cited and described in Samuel T. Dana and Sally K. Fairfax, *Forest and Range Policy, Its Development in the United States*, 2d ed. (New York: McGraw-Hill, 1980).) and Bergen v. Lawrence, 1988. These cases deal with excluding farm and wild animals, not recreationists, but the principles of fencing on public lands apply to recreation as well as animals.

Figure 3: Land use change following land tenure reform. Part of the land in this estate winery came out of Mt Difficulty Station, the first lease to undergo land tenure reform. Felton Road winery, near Bannockburn, Central Otago, NZ.

Figure 4: Trampers descending a foothill of the Southern Alps, Canterbury, New Zealand.

Chapter 4
Trading Sticks with the Crown:
Redistributing Property Rights to Effect Land Use Change

Introduction

Imagine that the US Bureau of Land Management (BLM) is getting out of the landlord business by conveying fee-simple title to almost 60% of the most productive federal grazing land in the American West to the ranchers. In addition, BLM terminates grazing permits on the remaining 40% of the land, and creates various forms of reserves to protect the land's conservation, recreation, landscape, or cultural heritage values. These reserve designations comprise national monuments, national parks, and wilderness areas; and grazing is prohibited this portion of what had been federal grazing land.

Now imagine that US grazing permits were compensable property rights, in contrast to current statute and case law.[91] Then picture a process in which the federal government and each rancher negotiate to buy the other's compensable use rights. The negotiations yield a result in which the government pays the ranchers twice as much as the ranchers pay the government, and ranchers end up with almost 60% of the land as fee-simple and $15.5 million. Each of the new freehold parcels has at least one access easement across it for recreation access to the conservation land behind. But little if any of the new freehold land is encumbered by conservation easements and their limitations on resource use.

[91] L Raymond, "Viewpoint: Are Grazing Rights on Public Lands a Form of Private Property?," *JOURNAL OF RANGE MANAGEMENT* 50, no. 4 (1997), Leigh Stafford Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy* (Washington, D.C.: Resources for the Future, 2003).

Now shift your gaze to the extreme southwest -- to the tussock bunchgrass, scree, and glacier-cloaked eastern slopes of the Southern Alps of New Zealand's South Island.

Figure 5: Lake Hawea, with Dingleburn Station on right-hand shoreline. Near Wanaka, Lakes District, New Zealand. After the change in land tenure, the former pastoral leasehold is now a patchwork mosaic of public and private land. Very roughly, land below the snow line is now private; land above is managed by DOC. Dingleburn is an exceptional case, by virtue of its size (23,000 ha) and the large portion transferred to DOC (70.6%). Despite the latter, recreationists must now traverse nearly 10km of recently privatized land before reaching the public recreation land beyond.

Like the US before it,[92] New Zealand is using the redistribution of property rights in natural resources as a policy tool to effect land use change. One-tenth of New Zealand is undergoing land reform which transfers title to productive land from the Crown to the pastoral leaseholders, and shifts the remaining land to the Department of Conservation (DOC). This article examines the legal structures and administrative mechanisms of land tenure reform of the pastoral estate on the South Island in light of an abstract view of property. After unpacking the mechanics of the exchange and redistribution o

f property rights, it uses data from photographs, legislation, case law, government documents, and key informant interviews to address three questions: 1) Is the redistribution of property rights changing land use

[92] Among others, see the Homestead Act, the General Mining Act, Taylor Grazing Act, especially as described in L Raymond and SK Fairfax, "Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis.," *Natural Resources Journal* 39, no. 4 (1999). See also George W. Bush's recent proposal for "Urban Homesteading" to promote the post-Katrina redevelopment of New Orleans.

patterns? 2) At what cost to the New Zealand people? And 3) Are there other mechanisms that might achieve similar goals?

New Zealand is giving up on the multiple use land management paradigm that dominates US public lands.[93] This land tenure reform of the pastoral estate is the last step towards separating commercial production from conservation. In 1987, the Fourth Labour government corporatised and later privatized the timber resource on state-owned forest land, disestablished the NZ Forest Service,[94] and shifted authority over the state-owned forest land containing indigenous forest to the newly formed DOC.[95] Managed by way of pastoral leases, the pastoral estate is slowly undergoing a similar redistribution of uses and title.

Currently the land, 2.4 million hectares, is held by the Crown and alienated by way of perpetually renewable leases to farmers for exclusive occupation and use of the pastoral[96] resource. Pastoral leases create a tangled web of perceived rights, financial interests, and public and private claims in Crown-owned land. In pastoral leases, the various property rights are divided among the lease holder and the Crown. Slowly, on a farm by farm basis, the lessees are entering negotiations with the Crown in which the bundle of property rights is redistributed.

The Land Act of 1948 governs the present distribution of property rights, while the Crown Pastoral Land Act of 1998 governs the redistribution with the end goal of separating land uses – privatizing economically productive land and centralizing Crown authority over land with conservation, recreation, heritage, and landscape values. As a result, the lessee gets freehold, fee-simple title to the more productive land "capable of economic use,"[97] and the

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[93] See MUSYA, NFMA, FLPMA, and their associated case law for statutory authority of US public land agencies to manage for multiple uses. Described in Dana and Fairfax, *Forest and Range Policy, Its Development in the United States*..

[94] Reg J. Birchfield and Ian F. Grant, *Out of the Woods : The Restructuring and Sale of New Zealand's State Forests* (Wellington [N.Z.]: GP Publications, 1993).

[95] See generally Bührs and Bartlett, *Environmental Policy in New Zealand : The Politics of Clean and Green?* P. A. Memon, *Keeping New Zealand Green : Recent Environmental Reforms* (Dunedin, N.Z.: University of Otago Press, 1993), Young, *Our Islands, Our Selves : A History of Conservation in New Zealand*.

[96] seasonal sheep grazing

[97] s.24(a)(ii) CPLA 1998 No 65

Crown recovers unencumbered possession of the land with “significant inherent values” worthy of protection.[98]

Why undertake a simultaneous land disposition and acquisition program by trading property rights? Legislation presents multiple goals: 1) allow farmers to make land more sustainably productive by intensifying land use and also discouraging rabbit infestation;[99] 2) secure the public’s right to “wander at will” in the high country without asking permission of the farmer with exclusive occupation rights;[100] 3) protect ecological, landscape, and heritage values by excluding sheep, and engaging in other management strategies of DOC; 4) divest the Crown of productive assets and get the Crown out of the business of farm administration, in keeping with the neoliberal state sector reforms of the 1980s. In short, the aim of land tenure reform is “to achieve more productive economic land use and conservation outcomes in the South Island high country.”[101]

In short, the Crown is trading and redistributing property rights, or “sticks”, in order to change land use. The government could have sought to achieve these goals legislatively or administratively – by changing the terms of the Land Act or the individual leases themselves. But Parliament initiated a transfer of property rights to achieve the stated land use goals, reasoning that the Crown and the lessee could best pursue their separate conservation and production goals separately – unencumbered by reciprocal property rights claims. The land tenure reform process redistributes the sticks and transfers rights in order to deliver two complete bundles of sticks – one bundle to the Crown to be managed by DOC, and one to the lessee with freehold, fee-simple title.

This chapter first reviews the abstract theory of property as a bundle of sticks, then delves into the current distribution of sticks in NZ’s pastoral estate,

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[98] CPLA §24(b)

[99] According current Parliamentary Commissioner for the Environment, and former director of the Rabbit Land Management Programme.

[100] New Zealand is a country where the current Prime Minister is well-known to be an avid outdoorswoman, and where “Outdoor Recreation” is the name of part of a political party.

[101] Cabinet Business Committee, "Cabinet Business Committee Minute of Decision," (Wellington: Cabinet Office, 2003). quoted at Brookers Looseleaf Legal Service, "Land Law," 11.25.01.

and describes how they are being redistributed under the 1998 statute. In examining the results of the reforms to date, it uncovers questions about the relative value of actual vs. potential property rights. Finally, in light of the lack of clarity in government policy on this question, I suggest a greater role for the Court and some alternative policy mechanisms for achieving the desired changes in land use.

The mechanics of distribution and redistribution of property rights

This work relies on the view of real property as a collection of rights, not a thing. Since the 1880s many property scholars and jurists have come to consider property not as a physical object, but as a collection of rights and duties.[102] Modern property law views property as highly divisible – very differently from the traditional Blackstonian view of property as a singular, physical, indivisible entity.[103] In this view, "property is best described as a social relationship giving an owner power over other individuals that restricts their control or use of an item or resource."[104]

Property is not land, a car, or a pair of trousers. Rather it is an assemblage of what one can and cannot do with the land, car, or trousers. One may wear the trousers, but may not strangle someone with them. One may drive the car, but not while drunk. And land is the most complicated of all, with many zoning, environmental, and other laws that overlay land ownership and restrict the uses in which the landowner may engage. And limitations on use also limit the financial value of ownership. A car without an engine has little value.

The first use of the term "bundle of rights" to describe property appears to be in 1888:[105] "The dullest individual among the people knows and

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[102] This allows for ownership of a much wider variety of physical and non-physical entities, including financial shares, options, security interests, and futures. Robert Jay Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks* (Burlington, VT: Ashgate, 2004), 34.

[103] Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*, 16.

[104] Ibid., 41., citing Charles B. McPherson, "The Meaning of Property," in *Property: Mainstream and Critical Positions*, ed. Charles B. McPherson (Toronto: University of Toronto Press, 1978).

[105] But the term is usually attributed to Supreme Court Justice Benjamin Cardozo or Professor Wesley Hohfield. And the concept without the term appeared earlier, as in English

understands that his property in anything is a bundle of rights."[106] And since the 1930s, the US Supreme Court has adopted the bundle of rights description of property over property as singular physical object.[107] As such, property as bundle of rights and duties has come to be the dominant paradigm in real property jurisprudence in the United States since the 1930s. The metaphor[108] certainly has its critics, but is so dominant that its critics and history are often ignored.[109]

The most important rights contained in the bundle include: use and control of revenue generated from property; exclusion of others; security of tenure from forced removal; alienation, bequest, or transfer; and destruction.[110] A complete bundle of sticks includes all 5 listed above, without qualification.[111] Of these, the right to exclude trespassers, or exclusive occupation in this case, is recognized in case law as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[112]

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judge John Austin's lecture circa 1828-1832: "It is manifest that the right, though deemed singular, is truly a collection or aggregate of rights."

Quoted in Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks*, p 35.

[106] John Lewis, A Treatise on the Law of Eminent Domain in the United States (1988). § 55 quoted in Ibid.

[107] For specific Court references to the bundle of sticks, see: Dolan v. City of Tigard (512 U.S. 374 (1994)); Coastal Petroleum Co. v. American Cyanamid Co. (492 So. 2d 339 (Fla. 1986)); De Byle's Inc. v. City of Rhinelander (143 Wis. 2d 894 (Ct of App., 4th Dist. 1988); Debortha v. Sunridge Land Co. Inc. (312 Ore. 307 (Ore. 1989))

all cited in Ibid., p 36.

[108] The metaphor "bundle of sticks" goes back to Aesop's fable in which a bundle of small twigs is harder to break than a single larger stick. Ibid., p. 35.

[109] Ibid., p 48.

[110] Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*, p. 17.

[111] Ibid.

Raymond notes that licensed property rights (such as grazing or mining permits) have qualifications on at least one of the sticks – in the US case, it's security of tenure. In the US case, grazing permitees have 10-year permits with a preferential right of renewal. They have a strong de facto security of tenure, but have been found by the Courts *not* to be vested property rights. They are somewhat transferable, but only through transfer of the private "base" property to which the grazing license is affiliated.

[112] Dolan v. City of Tigard (512 U.S. 374 (1994))

cited in Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks*.

Building on the abstract view of property, Raymond (2003) addresses questions of private interests in public resources relevant to the NZ case.[113] He invokes a concept of licensed property,[114] a "private legal right that provides a significant degree of security and exclusivity to resource users but remains unprotected from future government adjustment or cancellation without compensation. … The term recognizes that the private rights created by certain market-based policies are intended to function as a form of private ownership."[115] Pastoral leases are not a form of licensed property, because the loss of all or part of a pastoral lease is compensable according to the Land Act.[116] This stands in stark contrast to the property rights created by the US grazing permits, which are not compensable.[117]

Crown land, alienation, and the current distribution of property rights

The legal construct issuing grazing privileges to private farmers was born in New Zealand in 1856, when grazing leases were first established on the South Island.[118] At that time, the Crown held the land in question following purchases from Ngai Tahu in the 1840s and 1850s. The tenure of these first leases ranged from 1 year in the province of Canterbury, to 14 years in Otago.[119] Since 1856, the Crown has used leases and licenses to alienate the pastoral resource to farmers in order to promote settlement and development of the South Island high country,[120] while avoiding freeholding

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[113] for inquiries into this topic, see: S. K. Fairfax et al., "The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands," *Ecology Law Quarterly* 25, no. 4 (1999), Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*.

[114] Raymond notes that policies that create licensed property rights are market-based and are aimed at creating incentives of ownership to "attain environmental improvements". They might or might not be transferable. He also notes that licensed property is "not a term found in any legal text on property law, nor is it being proposed as such." Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*, p. 14.

[115] Ibid.

[116] s.117(2, 6) Land Act 1948 No. 64

[117] Raymond, *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*, p. 14.

[118] Broad, "The Changing Role of Government in the Management of Its High Country Lands."

[119] Ibid.

[120] Ibid.

the land deemed as too “fragile” for private ownership.[121] These leases and licenses have varied in form since 1856, but have gradually increased in length of tenure. Prior to 1948, leases ran for 21 years, were non-renewable, and subject to terms of the Land Settlement Board.[122] The 1948 Land Act increased tenure to 33 year, renewable leases, but lacked right to convert to freehold[123] because “the land was considered so environmentally fragile, that the Crown would not grant a right to freehold and imposed significant restrictions upon its use.”[124]

Looking at the successive Land Acts and amendments from 1856 through 1998,[125] it seems that questions of productivity and sustainability in the high country have always been intermingled with questions of tenure, property rights, and division of responsibility for productivity and sustainability among the lessee and the Crown.[126] Indeed according to a former adviser to Minister of Lands Dennis Marshall (sponsor of CPLA) and current DOC staffer, "it is difficult to avoid the suspicion that by 1920, insecurity of tenure had become a general scapegoat for all the ills of the high country, in fact, part of the high country mythology."[127] And the definitive land law text in New Zealand describes the politics of pastoral leases as: “The creation and reform of Crown pastoral leasese reflects the ongoing debate about whether public or private ownership achieves the best management and use of high country

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[121] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," (Wellington: 1994). citing Hansard, November 24, 1948, page 3999

[122] Brookers Looseleaf Legal Service, "Land Law," 11.22.02.

[123] some leases allow the lessee to purchase the lessor’s “reversion” at the end of the lease, effectively buying out the lessor’s interest and converting to fee-simple ownership. Ibid., 11.14.01.

[124] S.D. Brown, "Crown Pastoral Lease Tenure: A Catalyst or Constraint?," *NZ Valuers' Journal* 17 (1995). quoted in Brookers Looseleaf Legal Service, "Land Law," 11.22.02.

[125] see increasing strength of tenure at each iteration of distribution of the pastoral resource in: Land Acts and Amendments of 1877, 1882, 1885; Land Act of 1948; and CPLA 1998

[126] Broad, "The Changing Role of Government in the Management of Its High Country Lands," p. 8 and 32.

[127] H. Blake, "Pastoral High Country, Proposed Tenure Changes, and the Public Interest," in *Lincoln Papers in Resource Management* (Christchurch: Centre for Resource Management, Lincoln College, 1983). quoted in Broad, "The Changing Role of Government in the Management of Its High Country Lands," p. 33.

pastoral land."[128] Almost throughout the history of pastoral leases in New Zealand, the standard argument put forth by lessees was that the Crown did not offer secure enough tenure to provide incentive for farmers to improve the land and achieve maximum productivity.[129]

In their current form, pastoral leases are contractual agreements between the Crown (lessor) and the lessee, granted by the Commissioner of Crown Lands (Commissioner).[130] The Commissioner is responsible for the pastoral estate, and he delegates that power and function to the Crown Property Management Group of LINZ, in Wellington.[131] The leased land is a type of Crown land classified as "pastoral", or "land that is suitable or adaptable primarily for pastoral purposes only."[132] Other classes of Crown land, such as farm, urban, or commercial/industrial, support other, non-pastoral, uses. The pastoral classification restricts the lessee to pastoral use, and requires prior consent by the Commissioner for other, non-pastoral, uses. But this does not absolutely prohibit the leaseholder from engaging in ecotourism[133] while under lease, for example. He may, if he gets consent from the Commissioner. As such, the Crown controls usufructuary property rights to all non-pastoral uses, but on occasion may alienate a right to the farmer to engage in a certain approved non-pastoral use. By many accounts, the Crown has been a generous landlord, frequently granting consents for non-pastoral uses, and perhaps diminishing others' perception of its control over those property rights.

The leases are a form of Crown land, defined as "vested in her Majesty which is not for the time being set aside for any public purpose or held by any

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[128] Brookers Looseleaf Legal Service, "Land Law," 11.22.02.

[129] This argument seems a bit hollow though, given that according to Broad (no date), between 1924 and 1948, lessees had the opportunity to freehold their properties or to increase tenure to 70 years, yet only 10 of the 350 took advantage of the freehold option.Broad, "The Changing Role of Government in the Management of Its High Country Lands," p. 33.

[130] under §66 of the Land Act of 1948, repealed and replaced by CPLA §4(a-d)

[131] Brookers Looseleaf Legal Service, "Land Law," 11.22.03.

[132] §51(1)(d) of the Land Act (Later amended and repealed by CPLA §102, 104, 194 (1998 No. 65))

[133] for example, §106A allows for recreation permits for commercial recreation on pastoral land

person in fee simple."[134] But the land is not public, because the lessee's right of exclusive occupation precludes the public's free access without consent of the lessee. The lessee can also sell or transfer his lease with the Commissioner's consent.[135] And the lessee holds these rights virtually in perpetuity, as the leases are perpetually renewable, with the Crown only able to change the rent. However the Crown has a reversionary interest in the pastoral land, meaning that the asset reverts to the Crown upon termination of the lease or if the lessee breaches the terms.[136] "In principle, a pastoral lease or license could be terminated by the Crown for breach of covenant by the grantee. Such an occurrence is, however, unreported."[137]

A pastoral lease is a form of "alienation", or "limited disposal", of Crown land.[138] As such, pastoral lease land falls into the category of alienated Crown land,[139] but not fee simple, or "freehold", land. Hence the land belongs to the Crown, but several of the resources, including exclusive occupation, have been alienated to private interests.

The rights and responsibilities conferred by pastoral leases stem from five sources: the lease; Land Act 1948; CPLA 1998; Crown Pastoral Land Standards (non-binding guidelines for property management written by Property Regulatory Group at LINZ and the Commissioner); the common law of leases and licenses.[140] Sections 51-167 of the Land Act of 1948 govern the

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[134] Land Act §2. Also Part 6(129)(2)(e) of the TE TURE WHENUA MAORI ACT 1993/MAORI LAND ACT 1993 adds to the Land Act definition: "Land (other than Maori customary land and Crown land reserved for Maori) that has not been alienated from the Crown for a subsisting estate in fee simple shall have the status of Crown land."

[135] S 89(1) Land Act 1948, and subject to ss 8992, 96-99. The lessee may transfer even to Canadian pop star Shania Twain. See for example, Colin Espiner, "Shania Is Comin' on Over ..." *The Press*, 17 SEP 2004 2004.

[136] S19 CPLA 1998 allows the Court to terminate a lease upon breach. Brookers Looseleaf Legal Service, "Land Law," 11.24.05.

[137] Ibid., 11.1.

[138] Land Act §2

[139] Land Act §176 offers a very strong defense of Crown assets and resources held on Crown lands. It prohibits trespass by people, stock, or animals, and bars the removal of timber, bark, flax, guano, and mineral resources. But this section refers only to Crown land that is not subject to "lease, license, or demise serving to invest the exclusive occupation" of the land. So this does not refer to pastoral leases.

[140] Brookers Looseleaf Legal Service, "Land Law," 11.24.01.

[141] As of 7 Feb., 2005, there were 273, though with ongoing land reform, the number of leases is diminishing by the month. Cabinet Policy Committee, "Pol(05)14," p. 1.. for the latest numbers, see

classification and alienation of Crown land. The Land Act, modified by the Crown Pastoral Land Act of 1998 (hereafter CPLA) and other ensuing statutes, specifies which land interests are held by whom, which interests may be resumed by the Crown, and when compensation is owed to the lessee or license holder. In general, the lease affords the lessee "exclusive occupation and quiet enjoyment" of the land,[144] and exclusive right to pasturage.[145] This means that the lessee is allowed to run a specified number of sheep, and controls access to the lease land as s/he has the right to exclude trespassers.[146] A pastoral lease runs for 33 years with a perpetual right of renewal,[147] with rent reviews every 11 years.[148] The lessee is entitled to compensation if land is resumed by the Crown, and rent is reviewed every 11 years. Rent is fixed as a percentage of the land value exclusive of improvements. Finally, the lessee may apply for a commercial recreation operation permit, and may use timber growing on the lease land.

The lessee does not have right to the soil, nor to any use of the land other than pastoral farming without permission of the commissioner.[149] The lessee is obligated by way of implied covenant[150] to farm the land "diligently", to practice “good husbandry,”[151] to keep the land free of rabbits and other wild

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http://www.LINZ.govt.nz/rcs/LINZ/pub/web/root/core/CrownProperty/tractivitygraph/index.jsp, last visited 30 October, 2005

[142] Ibid., p. 7.

[143] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 11.

[144] Ibid.

[145] Land Act §66(2), repealed and replaced by CPLA §4(a-d)

[146] The Trespass Act of 1986 applies to pastoral leases.

[147] Land Act § 66(2) stated “A pastoral lease shall entitle the holder to the exclusive right of pasturage over the land comprised in the lease, and a perpetual right of renewal for terms of 33 years, but shall give him no right to the soil, and no right to acquire the fee simple.” This section was repealed and replaced by CPLA §4(a-d): “A pastoral lease gives the holder—
(a)The exclusive right of pasturage over the land:
(b)A perpetual right of renewal for terms of 33 years:
(c)No right to the soil:
(d)No right to acquire the fee simple of any of the land. (Cf 1948 No 64 s 66(2))”

[148] for leases granted after 30 November, 1979, rent is set at 2.25% of the value of the land exclusive of improvements. The Land Valuation Tribunal resolves any disputes over rent valuation. Brookers Looseleaf Legal Service, "Land Law," 11.24.02.

[149] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 12.

[150] Brookers Looseleaf Legal Service, "Land Law," 11.24.03.

[151] Land Act §99 (1)(a-c)

animals, and to keep the land of the waterways clear of weeds,[152] to avoid committing "waste."[153] As such, the farmer has a positive duty to conserve the productive values of the land. But the Land Act is silent on the farmer's duties regarding the natural, scenic, or cultural values.[154]

Further, the lessee is also bound by the Common Law Doctrine of Waste that applies to tenant-landlord situations in which the landlord has a reversionary interest. The doctrine prohibits the tenant from damaging the landlord's reversionary interest.[155] In this case, even if the Land Act did not require good husbandry, the lessee would still have to protect the leased asset.

The Crown retains ownership of the land exclusive of improvements, and continues to charge annual rent. The Crown also controls the following land uses: number of stock;[156] burning of tussock grasses;[157] afforestation;[158] non-pastoral commercial activities, including commercial recreation;[159] cultivation of crops and grass;[160] clearing forest and scrub.[161] The Crown may reclassify the land from "pastoral" to "farm", or another class, thereby granting permission to a lessee to pursue other allowed non-pastoral uses. Although the lessee may transfer the lease by bequest, sale, or other means, the Commissioner must approve the transfer[162] and may refuse to authorize the transfer including for reasons of public interest.[163]

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[152] Land Act §99

[153] Land Act §99(1)(a)

[154] Indeed, this is why conservation advocacy group Forest and Bird joined the campaign for land reform. The Forest and Bird magazine called for the following in 1994: "The 1948 Land Act needs urgent amendment to provide a better procedure for free holding and protection for land that has high conservation and recreation status." Sue Mataurin, "High Country Headway," *Forest and Bird*, February 1994.

[155] see Richard A. Posner, *Economic Analysis of Law*, Third Edition ed. (Boston: Little, Brown, 1986), pp. 34-35, Edward J. McCaffery, "Must We Have the Right to Waste?," in *New Essays in the Legal and Philosophical Theory of Property*, ed. Steven Munzer (Cambridge, U.K.: Cambridge University Press, 2001).

[156] Land Act §66(3), repealed and replaced by CPLA §9(1-4)

[157] Land Act §106

[158] Land Act §108

[159] Land Act §66(1), repealed and replaced by CPLA §4

[160] Land Act §108

[161] Land Act §108

[162] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p.. 13.

[163] Land Act §89(2)

An oft-amended clause allows the Minister of Conservation to designate any Crown land as a reserve "for any purpose which in his or her opinion is desirable in the public interest"[164] even if the land to be reserved is subject to a pastoral lease.[165] Most recently amended in 1994, this section is silent on the issue of compensation to the lease holder. Designating land as a reserve or conservation area might extinguish some of the lessee's use rights to the reserve land, as the land would still be retained in Crown *control* if not Crown *ownership* as in a national park.[166] But §117(1) authorizes the Governor-General (appointed by the Queen) to resume any portion or all of a pastoral lease if "in his [sic] opinion the land is required for a road, or street, or any public purpose."[167] In the event of a §117 resumption, the lessee is entitled to compensation for "any improvements belonging to him," "for the value of his interest in the unexpired term of his lease or license over the land so resumed,"[168] and for "injurious affection" caused by such a resumption.[169]

The Commissioner contends that the current distribution of property rights in pastoral leases constrains both parties' abilities to use the land. The Crown's interest constrains the lessee's use rights, and that the lessee's rights to pasturage and to exclusive occupation constrain the public's ability to use and conserve the resources.

> The Crown has an interest in production from, and a sustainable management of, pastoral land, as it has in land on all forms of tenure. The Crown also has interests in pastoral leases which relate to the safeguarding of the public interest in such matters as nature conservation, access, recreation, landscape and historic values. However, its ability to uphold these interests is constrained by the rights it has alienated (e.g. exclusive occupation and pasturage), in

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[164] Land Act §167(1) But according to the LINZ General Manager for Policy, NZ governments are willing to resume land from leases for hospitals and schools, but is less inclined to do it for reserves and parks. "This has to do with the Crown's willingness to exercise its compulsory powers. Legally, it's an option. But for this government, as for other governments, "there is no appetite for it."

[165] Land Act §167(3)

[166] Brookers Looseleaf Legal Service, "Land Law," 11.

[167] Land Act §117(1)

[168] Land Act §117(2)

[169] Land Act §117(6)

> perpetuity, to the lessees. The Crown is obliged to treat the lessee in a fair and reasonable manner.[170]

Currently the farmer holds very limited resource use rights, as the Land Act allows the farmer to pursue only pastoralism. But the farmer's right to exclusive occupation is very powerful, and can interfere with the Crown's ability to exercise the non-pastoral use rights that it still holds. For instance, the Crown holds the right to subdivide, but cannot act on it while the farmer holds exclusive occupation. Similarly, the public has very limited recreation access rights, as the lessee holds the right to exclude trespassers. Following the redistribution, the Crown will resume a complete bundle of use rights to the land shifting to DOC, unencumbered by lessee's rights to pastoralism and exclusive occupation; and the lessee will obtain fee-simple title and its corresponding complete bundle of rights to his portion of land.

Valuation of the Crown's financial interest: The Emmerson case

Our description of current property rights arrangements finishes with the most prominent oft-cited case law in matters regarding the Crown's interest in pastoral leases, the Emmerson case.[171] In 1998, a pastoral lessee family, the Emmersons, contested the Crown's re-evaluation of the farm's rent, arguing that the Crown had underestimated the land's improvements. As rent is fixed by statute as a portion of the land exclusive of improvements,[172] the Emmersons argued that "improvements" include more than what the Crown had previously estimated, therefore the lease rental should be lower. For reference, the average rent paid on a pastoral lease is NZ$6000 per year,[173] or $0.86 per hectare. Leases range in size from 1000ha, for about $1500 per year, to 16,000ha for about $10,000 per year.[174]

At question was, for the purpose of land valuation for rent, whether

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[170] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 14.

[171] According to LINZ General Manager for Policy, case law guides questions of where the interests in pastoral leases lie. The most prominent case is Emmerson, but there are others from the Land Valuation Tribunal.

[172] Rent is set according to §131 Land Act 1948, and §6-7 CPLA 1998.

[173] For reference, this is less rent than for a flat in Christchurch.

[174] Chair Cabinet Policy Committee, "South Island High Country Objectives: Report Back," (Office of Minister for Land Information, Office of Minister for Conservation, 2005).

inputs such as rabbit and weed control constitute "improvements"[175] or "good husbandry" as mandated of the farmer by terms of the Land Act.[176] In Commissioner of Crown Lands v Kinney,[177] the Court describes land exclusive of improvements as "in its natural state."

In Emmerson, the Dunedin based land valuation tribunal found that land exclusive of improvements constitutes "the severely depleted state that would have existed but for the improvements."[178] While the Land Act requires good husbandry, "improvements" includes the impacts of weed and pest control that go beyond husbandry. "The work carried out by the respondents to combat rabbits and hieracium went far beyond the obligations of good husbandry and maintenance imposed upon them, principally by §99, and constituted an improvement in terms of §2 of the Act."[179]

The Emmerson decision is informative on the issues of what constitutes an improvement and how to determine pastoral rents. But we must be careful in applying it to the current exchange of use rights. It clearly expands the definition of a compensable improvement in determination of value of the lessee's interest. The scope and value of improvements contribute directly to discussions of relative monetary values of the Crown's interest vs. the lessee's. But valuation of improvements relies on a physical view of property, and the redistribution of use rights in land tenure reform is best viewed within the framework of an abstract bundle of rights. The physical concept of improvements is central to determination of rent, but only tangentially related to land tenure reform. In land reform, it is use rights being exchanged, not improvements.

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[175] defined in §2 of the Land Act as "substantial improvements of a permanent character, and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivating of gardens; fencing (including rabbitproof fencing); draining; roading; bridging; sinking wells or bores … in any way improving the character or fertility of the soil."

[176] Land Act §99(a-c) imposes an implied covenant on the lessee that "he [sic] will … farm the land diligently and in a husbandlike manner according to the rules of good husbandry, … keep the land free from wild animals, rabbits, and other vermin, … properly clean and clear from weeds and keep open all creeks, drains, ditches and watercourses upon the land."

[177] (1064) NZ Valuer 273@ p 275

[178] Emmerson case p 24

[179] Emmerson case p 26

Trading Sticks with the Crown: Land Tenure Reform as Exchange of Use Rights

At its base, the redistribution process is a bilateral exchange of property rights: the lessee relinquishes exclusive occupation and pastoral use rights on land going to DOC; and the Crown grants the lessee, now landholder, all non-pastoral use rights (subject to New Zealand's Resource Management Act) on land to be freeholded.[180] Redistribution takes place within a long process of consultation between government contractors acting on behalf of Land Information New Zealand (hereafter LINZ), and DOC, local Maori iwi, and interested parties such as conservation and recreation groups.[181] When use rights and title change hands, each party buys out the other's interest, with the value of each interest determined by negotiation.

So the exchange comes down to trading exclusive occupation and pastoral use held by the lessee, for all non-pastoral uses held by the Crown. The non-pastoral uses are actually a bundle of rights as portrayed in Table 3, rather than a single use right. But they are only *potential* use rights, not actual. Taking subdivision[182] as an example, the lessee's exclusive occupation right precludes the Crown from subdividing land held under pastoral lease. Similarly, the Crown may not plant a vineyard on land under pastoral lease. The Crown holds the non-pastoral bundle of rights, and may allocate elements of it at will, but it may not exercise any of the rights in the non-pastoral bundle while the lessee holds the right of exclusive occupation.

So what of the value of these potential rights held by the Crown, and

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[180] for a Court discussion of the interaction between the RMA and the farmer's newfound subdivision right, see *Wakatipu Environmental Society Inc. v Queenstown Lakes DC* [2000] NZRMA 59 at paragraph 124, quoted at Brookers Looseleaf Legal Service, "Land Law," para.11.24.9.

[181] the land tenure reform process is subject to the following NZ legislation: CPLA 1998, Land Act 1948, Conservation Act 1987, Reserves Act 1977, as well as the principles of the Treaty of Waitangi (s 25(1)(b)). Ibid., para. 11.25.01, 11.25.02.

[182] And subdivision is a realistic example, as illustrated in media coverage of the results of land tenure reform: "Two large blocks of land on the shores of Lake Pukaki with views to Mount Cook are for sale. The land has been subdivided from Rhoborough Downs Station and, thanks to the Government's tenure review of high country property, can be sold freehold. Up for grabs are a 130.5 hectare block and a smaller 61.5ha block. … Pyne Gould Guinness (PGG) agent Hunter Doig said it was rare for land on the shore of the lake to come up. "It's on the junction of the turn-off to Mount Cook with absolutely stunning views. We've had the rough end of 100 inquiries." PGG thought there was potential for tourist accommodation, a retail complex, subdivision, viticulture or a lifestyle block."Staff, "Land on Shore of Lake Pukaki Goes on Market," *The Christchurch Press*, 19 APR 2005.

conveyed to the lessee? It might be that the lessee's exclusive occupation right quells the actual value of the Crown-held non-pastoral bundle *until* the conditions of the lease are extinguished. Once that happens, the value of those use rights such as subdivision and viticulture explode to life, as exhibited in Figure 6.

But according to Serkin (2005) "legal realists have long recognized that '[a] right is as big, precisely, as what the courts will do.'"[183] And markets have long realized that value is as big, precisely, as what the buyer is willing to pay. But in this case there is no market, as neither the lessee nor the government has any competition in buying out the other's interest in the lease. So in this case the ultimate value paid is determined by negotiations between the lessee and a government contractor acting on behalf of LINZ.

Table 3: Uses contained in the two bundles under the Land Act, subject to Resource Management Act

Pastoralism Bundle	**All-but-pastoralism bundle**
Grazing sheep and pastoral uses	Subdivision
Exclusive occupation	Viticulture
	Venison farming
	Stock numbers not limited by Land Act
	Ski fields
	Safari parks
	Condominiums
	Vehicle testing centers
	...

Herein lies the public policy problem that leads to our next set of questions. The lessee gains use rights that are hugely valuable when realized, but are of questionable value while the land is under lease. This might lead to the lessee receiving rights for which he does not have to pay. The Crown fails to capture potential revenue from its assets, and ends up paying millions of dollars to give away assets with huge *potential* value, but perhaps with no *actual* value while under lease. The next section examines the results and cost to date of the reforms, and suggests that the question of value of potential property rights is one for a Court, not for government

[183] Christopher Serkin, "The Meaning of Value: Assessing Just Compensation for Regulatory Takings," *Northwestern University Law Review* 99, no. Winter (2005): p.680., quoting *Karl Nickerson Llewellyn, The Bramble Bush 84 (1960)*

contractors. And if there is a discrepancy between potential and actual property values that causes the Crown to fail to capture revenue from disposing of its assets, the government should pursue a different policy mechanism.

Results of Land Tenure Reform – Is the redistribution changing land use?

As of June 2005, 30 pastoral leases had completed the reform under the CPLA, and 34 had gone through under the administrative process prior to 1998. 154 were in process, and 129 had yet to enter. Of the 64 completed, 229,652 ha have been converted to freehold and 165,446 ha have been restored to full Crown ownership.[184] This means that 62% of the former pastoral lease land has gone to freehold, and about 38% has been shifted to DOC custody and management. Government officials predicted in 2003 that by the time the reform is complete, the split will be closer to 50-50.[185]

Land title and status have changed on almost 300,000 ha, but what of land use patterns? With only 23% of the leases eligible for reform having completed the process, it is too early to evaluate how the South Island high country landscape will change following land tenure reform. But Figure 8 shows that many former pastoral leasehold sections are now part of parks, reserves, and conservation areas. And Figure 3 is just one data point indicative of the changing land use from pastoral lease to subdivision, viticulture, vehicle testing centers, and ski fields.

Results of Land Tenure Reform – At what cost?

This section examines the costs of land tenure reform to date, using two forms of data – what the government has said, and what it has done about the relative value of potential vs. actual use rights. Table 4 illustrates that the Crown is disposing of potentially valuable assets but failing to capture their value. This brings up two points regarding the cost of using property rights to effect land use change: 1) the Crown is disposing of assets without

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[184] Cabinet Policy Committee, "Pol(05)14," p.3.

The post-CPLA numbers come from the above report, but the pre-CPLA numbers come from a spreadsheet produced by LINZ and on file with the author.

[185] Land Information New Zealand, "Government Objectives for the South Island High Country: Report Back to the Chair, Cabinet Policy Committee (Office of the Minister for Land Information, Office of the Minister of Conservation, Office of the Minister of Agriculture and for Rural Affairs)." quoted at Brookers Looseleaf Legal Service, "Land Law," p.11.25.01.

reaping the benefit; 2) further, the Crown is actually losing money in the deal.

In a concurrent negotiation to the redistribution of property rights, each party (the lessee and the Crown) buys out the other party's property interest in the pastoral land; and the Crown makes land tenure reform sales and purchases. Since 1998 when records started, lessees have paid the Crown NZ$10.8 million;[186] while the Crown has paid the lessees NZ$26.28 million to buy out their interest.[187] So in aggregate, the lessees have received more land than the Crown,[188] and have received collectively NZ$15.5 million. Data on "equalization payments" are not widely publicized, and only available in aggregate form.[189] Further, this table accounts only for revenues and outlays for disposition and "purchase" of property rights on Crown land, exclusive of substantial administrative costs.

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[186] listed in LINZ annual reports as "land tenure reform sales"

[187] listed in LINZ annual reports as "land tenure reform purchases"

[188] A 2-tailed t-test comparing the two samples (freehold hectares from each of 64 hectares, and conservation land yielded from each reveals a p-value of 0.004, indicating that the two samples are indeed statistically different.

[189] While the break-down of hectares in the division of land in each lease is public knowledge, the equalization payments are confidential. The only available format for this data is in annual reports.

Table 4: Equalization Payments[190] (in NZ$000) 1992 - 2005

	land tenure reform purchases	Land tenure reform sales	revenue to Crown
1992	none reported separately	None reported separately	
1993	none reported separately	None reported separately	
1994	none reported separately	None reported separately	
1995	none reported separately	None reported separately	
1996	none reported separately	None reported separately	
1997	none reported separately	None reported separately	
1998	4600	5080	480
1999	1054	1076	22
2000	1888	1567	-321
2001	0	60	60
2002	0	0	0
2003	3824	2554	-1270
2004	7910	2626	-5284
2005	11,618	2912	-8706
Total	**30,894**	**15,875**	**-15,019**
since CPLA	**26,294**	**10,795**	**-15,499**

That the lessees have received the majority of the land *and* payments contradicts one government policy on pastoral land distribution and valuation, which implies that the Crown's bundle of property rights is of *equal* value to

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[190] The equalization payments are listed as land purchases and sales on the pages listed below in the appropriate LINZ Annual Reports. Reports from 2000-2005 are available at http://www.LINZ.govt.nz/rcs/LINZ/pub/web/root/supportinginfo/AboutLINZ/publications/index.jsp (last visited 31 October, 2005). Previous reports are available from LINZ.
Land Information New Zealand, "Annual Report for the Year Ended 30 June 1998 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 1998), pp 65, 66, Land Information New Zealand, "Annual Report for the Year Ended 30 June 1999 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 1999), 79, 80, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2000 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2000), pp 71, 72, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2001 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2001), pp 69, 70, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2002 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2002), pp 69, 70, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2003 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2003), 74, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2004 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2004), pp 49, 50, Land Information New Zealand, "Annual Report for the Year Ended 30 June 2005 Presented to the House of Representatives Pursuant to Section 39 of the Public Finance Act 1989," (Wellington: Land Information New Zealand, 2005), pp 50, 51.

the lessee's. This interpretation would seem to assign similar value to the Crown's potential use rights and actual use rights.

> Where the lessee is able to freehold the majority of the lease the lessee is likely to pay the Crown. Where a significant portion of a lease is retained (by the Crown for the conservation estate) the settlement is likely to require a payment by the Crown.[191]

By contrast, another government document from the same agency in the same year asserts that the lessee's interest in the land is of *greater* value than the Crown's. This alternate interpretation seems to imply that Crown "control of" potential use rights has far less value than the lessee's actual use rights.

> 96. The assessment of the Crown's interest in pastoral lease properties includes the rental flow derived from the lease, control of non-pastoral commercial uses of the land, control of additional property rights such as sub-division and the right to protect inherent values on the land. The assessment of the lessee's interests includes the right to pasturage, the right to quiet enjoyment, exclusive possession, a perpetual renewal lease, and the right to on-sell the lease.
>
> 97. From a legal or economic perspective, the nature of these rights is such that the lessee has the greatest interest in the property. The common misconception that pastoral lease land is "public land" may have contributed to a belief that the Crown's interest is undervalued.[192]

The contradiction in these two interpretations reveals some governmental uncertainty regarding the relative value of the two interests and of potential vs. actual property rights. But it is clear that the actual value of the non-pastoral bundle of uses is greater than the actual value of the pastoral use, *after* land tenure reform is complete. The government reports that new, non-pastoral, land uses such as subdivision and viticulture have doubled land values after land tenure reform in some cases, especially in Otago's Lakes District around Queenstown and Wanaka.

> In the past 10 years the average increase in sale price for all rural land has been in the vicinity of 30%, whereas freehold pastoral properties

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[191] Land Information New Zealand, "Terms of Reference: South Island High Country Objectives, Review of Valuation Methodology in Tenure Review," (Wellington: Land Information New Zealand, 2005), 1.

[192] Chair Cabinet Policy Committee, "South Island High Country Objectives: Report Back."

> have increased by 115% and pastoral leases by some 179%. Even more dramatic has been the increase in value of some land adjoining pastoral leases. Good viticultural land has doubled in value in the last four years and the value of rural residential land close to tourist resorts has fluctuated widely over the ten year period and in prime areas has more than doubled in the last three years. … Demand for pastoral properties is greater on those properties with special features such as location, history and other SIVs [significant inherent values for conservation, recreation, or cultural heritage]. … There is a spectrum of land prices paid for pastoral leases, from the highest prices paid in the Otago Lakes District, through to those paid in the area of Lake Dunstan through to Alexandra. Sales in the Lakes District have been focused on Queenstown and Wanaka, where the sale prices reflect an investment in real estate, rather than the economics of pastoral farming, although there have been occasional sales of this type in the other regions. [193]

As such, non-pastoral land uses yield higher resale land value than pastoral uses. Government documents are clear that in a modern real estate market where pinot noir and lifestyle blocks net more than merino wool, non-pastoral use rights are more valuable than the pastoral. And Figure 2 and Figure 6 reveal that, once actualized after land reform, use rights for subdivision, viticulture, etc. become very valuable to the new freehold owner. But government policy is less clear on the relative values of the potential vs actual property rights.

Despite policy confusion, the quantitative results of land tenure reform demonstrate that in recent negotiations, the lessee's bundle of property rights is valued far more highly than the Crown's. This seems to indicate that the Crown is willing to sell the potential rights to subdivision, etc. for very little, because they are only potentialities. But this has not always been so. It is only in 2003 that the difference between land purchase costs and sales revenues becomes marked. Perhaps earlier land tenure reform deals afforded fairly equally value to the Crown's property rights and the lessee's, however as the particularistic data is classified by the government under § of the Official Information Act.

Policy alternatives and the role of the Court

This leads to two more points regarding the law and policy of property rights and land use: 1) as the government is unclear about the relative values

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[193] Ibid., p 2.

of actual vs. potential property rights, this question should be addressed by the Court, not by government contractors or even by LINZ officials negotiating on behalf of the Crown. 2) Given the lack of clarity and the Crown's quantitative failure to capture the benefits of land disposal, the government should consider other policy mechanisms to change in land use at less cost. After reviewing the desired changes in land use defined in statute, this section lists a few possible alternative mechanisms to achieve those goals.

CPLA governs the redistribution of property rights to achieve four goals: 1) to foster high country management patterns that are "ecologically sustainable;" 2) to free lease land "capable of economic use" from "current management constraints" of the Land Act that prohibit all non-pastoral uses; 3) to protect significant inherent values "preferably" by restoring it to full Crown ownership; and 4) to "secure public access and enjoyment" of the high country.[194] Ecologically sustainable land use is the primary goal, as the law states that the others are all subject to the first. While ill-defined at best, ecological sustainability in the high country involves a more diverse suite of land uses than just sheep grazing, according to the Rabbit and Land Management Task Force whose work fed into the inception of land tenure reform.[195] As such, diversification of land use is a primary goal of land tenure reform.

How might the government simultaneously allow for land use diversification on productive land, while protecting conservation values and providing universal recreation access to land with "significant inherent values"?

1) Involve the Courts: When policy is unclear, let the Courts decide. Perhaps the simplest option, this would maintain the current mechanism of redistributing property rights but change the administrative arrangements. Currently, the redistribution and determination of equalization payments take place in a process of

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[194] Each of the Cabinet reports cite these goals as the first four "high country objectives." But these 4 goals mirror the objectives of the CPLA §24.
Cabinet Business Committee, "Cbc Min (03) 10/3," p. 2.

[195] Interview with Parliamentary Commissioner of the Environment, former Director of the Rabbit and Land Management Programme.

consultation between LINZ contractors and the lessee, DOC, Maori, and other interested parties. LINZ is simultaneously a negotiating party with a vested interest, and the referee in charge of the process. This option would place the judiciary, rather than LINZ, in the role of referee in charge. It could make use of the existing Land Valuation Tribunal[196] or the Environment Court for this. This would enhance the role of the Court in determining relative value of potential vs actual property rights, rather than leave it to the negotiating powers of lessees and LINZ. It would also relieve LINZ of the conflicting roles of representing the Crown's interest while administering the process itself. This option is discussed more thoroughly in Chapter 4.

2) Buy and sell: The Crown could buy the entire lease, using the existing mechanism of the government's Nature Heritage Fund for whole property purchase. Following the purchase, the government could identify the significant inherent values worthy of protection by a similar consultation process as in the existing land tenure reform. As the government would be the holder of the complete bundle of rights, identification of protected land would not be constrained by the lessee's interest. After reserving some land for DOC, the government could sell the remaining land "capable of economic use" at auction. This would allow a market mechanism to determine the value of potential and actual property rights, rather than a private negotiation. It would also increase the likelihood of the Crown capturing potential value from the assets which it is disposing. Though the initial cash outlay for the whole property purchase would be high, figures 2 and 6 suggest that the revenues generated at auction would likely be higher.

3) Create reserves and amend Land Act: The Land Act gives ministers and the Governor General authority to create reserves

[196] The Land Valuation Tribunal settles rent disputes. See www.linz.govt.nz/rcs/linz/6360/rent_reviews.pdf, cited at Brookers Looseleaf Legal Service, "Land Law," para. 11.24.02.

on land under pastoral lease. Hence the government could create reserves on land sections with desired values, and create access easements across the pastoral land surrounding the reserves. The Land Act does not require compensation to the lessee for creation of the reserves themselves, but might require compensation for any value lost due to the easements or exclusion of sheep from the reserves. At the same time, Parliament could amend the Land Act to allow more uses on pastoral land – from viticulture to ski fields to golf courses – as desired by Parliamentarians and as permitted by the Commissioner and the Resource Management Act. This option would not allow for any freeholding, and would likewise not extinguish the lease over land designated as reserves. But it would allow for protection of values, recreation access, and land use diversification. The cost would be administrative and any compensation owed to the lessee. Ideally, that compensation would be determined by a Court such as the Land Valuation Tribunal.

4) Buy some and amend: The government could buy out the lessee's interest in land deemed to be of conservation, recreation, or heritage value, and thus regain fee simple title (or "full Crown ownership) to land going to conservation. As a condition of the government purchasing the lessee's use rights, the government could amend and relax the Land Act's pastoral requirement, allowing for diversification but no subdivision. This would not allow a freehold option, but would coney many of the property rights associated with freehold, and many of the rights in the non-pastoral bundle desired by lessees.

5) Covenants: Freehold the entire property, and place conservation covenants and access easements on land desired for conservation and recreation reasons. Enforcement of these covenants would require more and different governmental and non-governmental regulatory infrastructure than is currently extant

in New Zealand. The Crown would capture more revenue this way, and would certainly meet diversification goals, but the conservation and recreation access might be less than secure under current regulatory structures.

These are just a few options, briefly presented. Each would have proponents and opponents, and costs and benefits. It is not an exhaustive list, but merely suggests that there are alternatives.

Conclusion

Redistribution and exchange of property rights can be tools for several ends related to land tenure and the multiple use paradigm: clarity of tenure; neat separation of resource uses; diversification of land use; clear conservation mandate on conservation land. This paper asks how the process is going in New Zealand, in light of an abstract view of property.

New Zealand is using property rights as a tool to change land use patterns in the high country of the South Island. This paper has examined the property rights redistribution mechanism, taken a brief look at changing land uses, evaluated the cost of such a scheme, and proposed policy alternatives. In terms of resource use, there are three sticks being traded in land tenure reform: diversification of land use beyond pastoralism, exclusive occupation, and pastoral use. The Crown holds the first, while the lessee holds the latter two. But there is uncertainty in government policy about the relationship between the exclusive occupation right and other potential use rights held by the Crown. One government document seems to indicate that potential use rights have similar value to actual use rights, while another implies that potential use rights have very little value – that exclusive occupation effectively quells the value of the Crown's potential use rights. But the results to date of land reform are clear. Redistribution of property rights is changing land uses, but the New Zealand government is paying millions of dollars to dispose of potentially valuable resources.

The apparent uncertainty regarding the value of potential vs. actual use rights seems to be causing the government to fail to capture the revenues from the disposition of potentially valuable resources. Given the uncertainty

and its apparent results, the government should look to the Courts for guidance and consider other policy options.

Figure 6: Empirical valuation of newly freeholded pastoral land: 8ha for $320,000 near Wanaka.

Chapter 5
Who is sticking up for the Crown?
The myth of apolitical administration in New Zealand land tenure reform

Introduction

The politics-administration dichotomy is alive and well in New Zealand. The oldest trick in the public administration book of theory, the dichotomy has enjoyed a "reinvigoration" since the 1980s in the forms of managerialism,[197] neo-managerialism,[198] New Public Management,[199] and the business model of government. Managerialism and its progeny have their roots in a strong ideology[200] in which management is good, will render clear objectives, motivated staff, fiscally responsible actions, elimination of red tape, and yield fair and uncaptured policy results. All of this will be achieved by applying business practices to the public sector.[201] Drawing from the principles of scientific management,[202] this "new-Taylorism" described by Pollitt has been coupled with the philosophy of public choice, transaction cost economics, and agency theory to form what Terry calls "neo-managerialism" and what Boston and others call New Public Management. This latter form, with its triumvirate of theoretical underpinnings, drives the reformed civil service of New Zealand today.[203]

This chapter asks what happens when the goals and administrative tools shared by the older dichotomy and the newer "managerialist" split are applied to a process of redistribution of government-owned natural resources.

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[197] Chad Kniss, "Book Reviews: Managerialism by Mark Considine and Martin Painter, Melbourne University Press (1997)," *Journal of Public Administration Research and Theory* (1999). citing Mark Considine and Martin Painter, *Managerialism* (Melbourne: Melbourne University Press, 1997).

[198] Larry Terry, "Administrative Leadership, Neo-Managerialism, and the Public Management Movement," *Public Administration Review* 58, no. 3 (1998).

[199] Jonathan Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution* (Auckland, N.Z: Oxford University Press, 1991).

[200] Described clearly in Christopher Pollitt, *Managerialism and the Public Service: The Anglo-American Experience* (Cambridge: Basil Blackwell, 1990), ch.1.

[201] Ibid., 7., cited in Terry, "Administrative Leadership, Neo-Managerialism, and the Public Management Movement," p. 196.

[202] Frederick Winslow Taylor, *The Principles of Scientific Management* (New York London: Harper & Brothers, 1911).

[203] Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*.

It finds that the goal of avoiding agency capture by producers, special interests, or rent-seeking legislators may well be sound. But the models' assumptions that insulating administrators from the storms of politics a) is possible and b) will produce less biased results did not hold true. Hence in the case of NZ land reform, the administrative tool of a functional split between policy and operations in the pursuit of administrative neutrality seems to have produced results which are more biased towards the production (sheep farming) interest than predicted either by government policy,[204] by or interest group theories of agency capture[205] and public choice.[206]

One of the goals[207] of NZ's managerialist reforms was to avoid or at least minimize "bureaucratic or producer capture" of agency activities by separating commercial from non-commercial functions of agencies, and by separating policy from operations.[208] Several of the features of NZ's New Public Management as described by Boston et. al. (1991 and 1996) are plainly in evidence in land tenure reform including: "an emphasis on management rather than policy, in particular a new stress on management skills in preference to technical or professional skills; … the devolution of

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[204] see quote at footnote 191

[205] Agency capture describes a situation in which a particularistic interest -- political, economic, or both – co-opts an agency's activities and decisions. See generally Philip Selznick, *Tva and the Grass Roots : A Study of Politics and Organization*, California library reprint series ed. (Berkeley and Los Angeles: University of California Press, 1980).

[206] When public choice theory considers interest group politics, it predicts that organized groups who advocate for measurable benefits to a concentrated group of people will win over advocates for "public goods" which benefit a diffuse group that is difficult to identify. Hence public choice theory has constructed mechanisms, such as the policy-operations split, to avoid this almost inevitable "producer capture" of policy and its implementation. According to public choice theorist Eskridge, "Although the interest group model of the legislative market is necessarily hedged with caveats and expressed in terms of probabilities, its general thrust is pretty grim. The legislative market is one that works badly. The public goods that government ought to be providing ... are seldom passed by the legislature, because demand for them is ususally not strong and legislators gain too little from sponsoring them ... Conversely, rent-seeking statutes -- primarily, concentrated benefit, distributed cost measures -- seem inevitable."

W. Eskridge, "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation," *Virginia Law Review* 74 (1988). quoted in D.. Farber, "Politics and Procedure in Environmental Law," *Journal of Law, Economics and Organization* 8, no. 1 (1992).

[207] Boston lists all the reform's goals as: "consistency, accountability, transparency, contestability, complementarity, coordination, economy, efficiency, the minimization of capture, and improved bureaucratic representation for disadvantaged groups." Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*, p. 239.

[208] Ibid., p. 239, 40. citing State Services Commission, "Financial Management Report," (Wellington: 1988).

management control; … the disaggregation of large bureaucratic structures into quasi-autonomous agencies, in particular the separation of commercial from non-commercial functions and policy advice from policy implementation; [and] a preference for private ownership, contracting out, and contestability in public service provision."[209]

According to Boston,[210]

> A central feature of [the 4th] Labour [government]'s machinery of government changes was the separation of the provision of policy advice from the provision of services (and from regulatory or review functions). The chief rationale for embracing the functional approach lies in the argument that it reduces the potential for the policy advisers to be 'captured' by those delivering the services which the government 'purchased'. As the Strategos Report on Defense puts it: 'Policy and advisory roles ought to be separated from the administrative and operational aspects of each department … to ensure that there is no monopoly on policy advice, and more importantly to ensure that policy is not the exclusive preserve of the operational agency.'

Many of the features of New Public Management, managerialism, and public choice resemble and rely on the maxims of the politics-administration dichotomy.[211] The age-old dichotomy and the newer policy-operations split

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[209] Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*, p. 9.

[210] Ibid., p. 258-9.

Boston lists other goals of the policy-operations split as including: "cost-effectiveness, responsiveness to clients, contestability in provision of services, the desire to encourage citizen participation, and … [giving] expression to different cultural values. …Those committed to radical democratic principles and the devolution of service delivery to local and regional government … will necessarily favour the decoupling of policy advice and policy implementation."

[211] Scholars commonly attribute the dichotomy to early scholars Woodrow Wilson (1887), Goodnow, and White (1926), though Svara (2001) and O'Toole have argued that their predecessors did not advocate for such a strict dichotomy as is now portrayed. Wilson's maxim "administrative questions are not political questions" embodies the dichotomy. Its historical roots lie in the "emphasis on separation and insulation of administrators from political interference." (Svara 2001) In practice, while the civil service reforms of the 1870s and 1880s did away with the spoils system and formed the philosophical underpinnings of the dichotomy, the reforms of the Progressive era in the US institutionalized it. Reforms associated with the dichotomy included: systems civil service merit and position classification; political neutrality; "rationalization" of budgets; and efforts to implement Frederick Taylor's principles of "scientific management." (Rosenbloom 1993, citing Doig 1984) The dichotomy was in part intended to remedy the spoils system, reasoning that depoliticizing the public service would avoid administrative political favours, and lead to more fair governance. According to Rosenbloom (1993):
"The dichotomy was a weapon in a monumental struggle between 'two thoroughly different systems of political ethics' (Hofstadter 1955 p 9; Rosenbloom 1971 chap. 3). Depoliticization

share implementation goals, underlying assumptions, and administrative tools. They aim to avoid agency capture in any form – by rent-seeking legislators, interest groups, or industries. They assume that a politically neutral and autonomous policy implementation branch of the civil service will deliver unbiased, uncaptured results. And they adopt the administrative tool of a functional split described in various terms – politics vs. administration in the separation of powers, policy vs. operations, and policy advice vs. implementation. Hence the old and new theories in turn share several assumptions about removing politics from administration: 1) that it is possible; 2) that it will lead to unbiased, uncaptured results; 3) that unbiased results are universally and measurably better – more fair or just – than the alternative.

But Boston contends that splitting policy (policy advice) and operations (implementation) will achieve little in minimization of capture, as it only addresses capture by producers, not by ideology, clients, or expertise.[212] Boston attributes the over-emphasis on producer capture to the managerialist reliance on public choice theory, and its prediction that production-oriented commercial interests who benefit a concentrated group of people will win over a more diffuse, or public, interest.[213] Boston suggests that agency capture by production interests is not as serious of a problem as public choice predicts, but "to the extent that … capture … is a problem, the remedy lies in a combination of institutional pluralism, multiple advocacy,[214] internal and external mechanisms for vetting departmental advice, the use of consultative arrangements, and maximum government openness.[215] In general, it is not to be found in functional separation."[216]

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of the public service was intended to deprive political bosses of patronage, which was viewed as their key resource."

[212] Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*, p. 260.

[213] Ibid., p. 261.

[214] similar to Culhane's multiple clientelism Paul J. Culhane and Resources for the Future, *Public Lands Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management* (Baltimore: Published for Resources for the Future by Johns Hopkins University Press, 1981).

[215] B. Schaffer, "Brownlow or Brookings: Approaches to the Improvement of the Machinery of Government," *New Zealand Journal of Public Administration* 24 (1962).

[216] Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*, p. 262.

Despite its endurance and modern resurgence, the politics-administration dichotomy is a false one, and even its creators did not advocate its strict and simplistic application to governance.[217] According to O'Toole:[218]

> Today, nearly every student of American public administration is taught the bankruptcy of the simple version of the dichotomy. ... In short, the dichotomy has collapsed ... Yet … it would be incorrect to conclude that these constructs are merely fictions or dogmas that paraded as truths in an earlier era but have served no useful purpose. Rather, these ideas helped earlier generations of reformers fashion an administrative state.

The endurance of the dichotomy in the psyche of civil servants and in modern theories indicates that its effects still bear examination, even more than a century after its inception. This article examines application of the politics-administration dichotomy and the modern policy-operations split to the governance of land reform in New Zealand, and cautions that public administration theorists should be careful what they wish for. Aiming to create a neutral policy administration by insulating administrative operators from political interference and creating a functional split between politics and administration can backfire. Whether using an administrative tool of a split or a dichotomy, assuming that administrative neutrality exists and will produce an uncaptured result can result in just the opposite – the Crown giving valuable property rights in land to the dominant interest, and simultaneously paying them to take it.

Background

New Zealand is engaging in land reform to divide Crown land currently leased to pastoral farmers for sheep grazing into two categories of land tenure: 1) full Crown ownership in which leasehold rights have been extinguished, and which is managed by the Department of Conservation; and 2) freehold (or fee-simple) title coneyed to the farmer, on which pastoral

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[217] J.H. Svara, "The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration," *Public Administration Review* 30, no. 6 (2001).

[218] Laurence O'Toole, "Doctrines and Developments: Separation of Powers, the Politics-Administration Dichotomy, and the State," *Public Administration Review* 47, no. 1 (1987): p. 23.

restrictions on land use have been extinguished.[219] Land tenure reform is an exercise in redistribution of property rights in order to pursue both conservation and diversification of commercial land use, simultaneously but on separate parcels of land.[220]

Currently, the land is owned by the Crown, but the pastoral and exclusive occupation (or residential) use rights are alienated to the farmers by leases governed by the Land Act of 1948. The leases create a confusing web of compensable property rights, financial interests, and public and private claims in Crown-owned land. Governed by the Crown Pastoral Land Act (CPLA) of 1998 and administered by Land Information New Zealand (LINZ), land tenure reform redistributes the property rights so that each party[221] ends up with fee-simple title, or a complete bundle of property rights, to a block of land on which to pursue goals of conservation and recreation or commercial production.

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[219] The goals and parameters of the land reform are stated in §24 of the Crown Pastoral Land Act of 1998 as:

(a)To—

(i)Promote the management of reviewable land in a way that is ecologically sustainable:

(ii)Subject to subparagraph (i), enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument; and

(b)To enable the protection of the significant inherent values of reviewable land—

(i)By the creation of protective mechanisms; or (preferably)

(ii)By the restoration of the land concerned to full Crown ownership and control; and

(c)Subject to paragraphs (a) and (b), to make easier—

(i)The securing of public access to and enjoyment of reviewable land; and

(ii)The freehold disposal of reviewable land.

[220] In many ways, land tenure reform follows the model established by New Zealand's Fourth Labour Government in 1987 when it disestablished the NZ Forest Service to separate the commercial timber from conservation pursuits. It corporatised and later privatized the National Forest lands whose primary value was for commercial timber production, and shifted authority over the national forest land containing indigenous forest worthy of conservation to the newly formed Department of Conservation.[220] And the administrative structures that manage the reform process follow the model of New Public Management, also institutionalized during NZ's broadscale reforms of the 1980s.

[221] the Crown and the lessee

The Crown pastoral estate comprises about 2.4 million hectares, or about 10% of New Zealand. There are now about 273[238] pastoral leases on the eastern slope of the Southern Alps. The average size is about 7000 ha.[239] The leasehold land collectively supports about 2.8 million sheep, or about 4% of the national total. The pastoral estate produces a large portion of New Zealand's "extra fine" Merino wool, but is quite varied in its pastoral productive capabilities, from the highly productive low lands up to land above 2000m in altitude with little to no productive capacity.[240]

Slowly, farm by farm, the lessees are entering negotiations with the Crown in which the property rights are redistributed with the end goal of separating land uses – privatizing land "capable of economic use,"[241] and reasserting Crown authority over land with "significant inherent values"[242] for conservation, recreation, heritage, and landscape.[243] As of June 2005, the Crown has conveyed freehold title to 58% of the land that has undergone review, or 229,652 hectares.[244] And DOC has received 42%, or 165,446

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[222] Seth Robson, "Survivor of a High-Country Showdown," *The Press*, 1 November 2003 2003, p. 10.
[223] Land Act §66
[224] Land Act §51
[225] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 11.
[226] Land Act §66 (2)
[227] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 12.
[228] Ibid., p.13.
[229] Land Act §89(2)
[230] Land Act §99
[231] Land Act §66 (3)
[232] Land Act §106
[233] Land Act §108
[234] §66 (1)
[235] Land Act §108
[236] Land Act §108
[237] Land Act §117, 167
[238] As of 7 Feb., 2005, there were 273, though with ongoing land reform, the number of leases is diminishing by the month. Cabinet Policy Committee, "Pol(05)14," p. 1.
[239] Ibid., p. 7.
[240] Commissioner of Crown Lands, "The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper," p. 11.
[241] CPLA §24(a)(2)
[242] CPLA §24(b)
[243] "inherent values" are defined in CPLA §2(15)(a-b)
[244] Cabinet Policy Committee, "Pol(05)14," p. 3.
The post-1998 numbers come from the above report, but the pre-1998 numbers come from a spreadsheet produced by LINZ and on file with the author.

hectares.

In a concurrent negotiation, each party buys out the other's property interest and use rights in the lease land, under §34 CPLA 1998. To buy out the Crown's interest, lessees have paid the Crown NZ$10.8 million since 1998; while the Crown has paid the lessees NZ$26.29 million to buy out their interest. In total, the Crown has paid NZ$15.5 million more than lessees have paid the Crown in "equalization payments."[245] This contradicts the government's stated policy of the party who receives more land will owe the other some money.[246]

Parliament gave statutory authority to the reforms in the 1998 passage of the Crown Pastoral Land Act, but the Commissioner of Crown Lands (Commissioner) actually began redistributing property rights administratively in 1992. Land Information New Zealand, or LINZ, runs land tenure reform as a process of repeated consultations.

The politics-administration dichotomy in land reform: LINZ as neutral referee

The politics-administration dichotomy is in evidence in three facets of New Zealand's land tenure reform process, which are all progeny of the first: 1) the stated neutrality of the agency in charge; 2) the agency's stated role as impartial umpire of the process, rather than advocate for the Crown interest; 3) the stated unwillingness to engage in political advocacy for one side, instead relying on administrative procedure to produce a fair result.

Officials of the Crown agency in charge of land tenure reform, LINZ, see the agency's job to be neutral and objective.[247] They see their role as purely administrative, not political. For the Commissioner of Crown Lands, politics is "not where I am supposed to be as a public servant." According to the manager of Crown Property Management, "LINZ is a public agency. We

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[245] See Table 4: Equalization Payments (in NZ$000) 1992 - 2005 for detailed figures.

[246] "Where the lessee is able to freehold the majority of the lease the lessee is likely to pay the Crown. Where a significant portion of a lease is retained (by the Crown for the conservation estate) the settlement is likely to require a payment by the Crown."

Land Information New Zealand, "Terms of Reference: South Island High Country Objectives, Review of Valuation Methodology in Tenure Review," p. 1.

(see also chapter 4)

[247] And many within and outside of LINZ recognize that the agency and its service providers espouse neutrality in the process, though some recreation – conservation advocates question whether neutrality is possible and posit instead that LINZ favors farmers.

do what government asks us to do. We are a neutral public service. Neutrality is just a basic tenet of public service. The State Sector Act [of 1988] compels us to be neutral."

Land tenure reform resides in the technical, so-called apolitical, implementation side of the policy-operations split. Although government officials and contractors are making and implementing inherently political choices, the policy-operations split seems to attempt to somewhat absolve them of a political role. Along with numerous political scientists,[248] I argue that such an absolution is not only impossible, but patently ridiculous. Further, in this case, an absolution is dangerous, as it is leading to results that appear on their face to be highly captured.

According to LINZ and its contractors, in land tenure reform LINZ and its contractors do not take sides – with the farmer nor with recreation – conservation advocates.[249] According to the tenure reform manager in Christchurch, "We side with the factual information, not with political interests." LINZ's position is "straight up the middle. We don't have an advocacy role on either side. We're not advocating for freehold or for conservation. We are just administering the law."[250] The Commissioner also describes his job as *not* to cater to any of the interest groups. "We're not going for full-blooded acceptance; we're just going to the level of acceptance where people generally go 'aww yeeeah.' We're trying to get the best outcome to meet the Act, not [the] objectives of lessees or public interest groups. We have got to

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[248] For example, see: O'Toole, "Doctrines and Developments: Separation of Powers, the Politics-Administration Dichotomy, and the State.", Colin Campbell and B. Guy Peters, "The Politics/Administration Dichotomy: Death or Merely Change," *Governance* 1 (1988), J.A. Rohr, *Ethics for Beaureaucrats: An Essay on Law and Values* (New York: Marcel Dekker, 1989), D. Rosenbloom, "Editorial: Have an Administrative Rx? Don't Forget the Politics!," *Public Administration Review* 53, no. 6 (1993), Guy B. Peters, "The Civil Service in the Consolidation of Democracy," *International Social Science Journal* 47, no. 1 (1995), J.H. Svara, "The Politics - Administration Dichotomy Model as Aberration," *Public Administration Review* 58, no. 1 (1998), Kniss, "Book Reviews: Managerialism by Mark Considine and Martin Painter, Melbourne University Press (1997).", Moshe Maor, "The Paradox of Managerialism," *Public Administration Review* 59, no. 1 (1999), Mark Rutgers, "Splitting the Universe: On the Relevance of Dichotomies for the Study of Public Administration," *Administration and Society* 33, no. 1 (2001), Svara, "The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration."

[249] According to a LINZ contractor, "no we are not advocating, and we are not given a statutory role. We are melting pot of all information."

[250] Tenure Review Manager in Christchurch

maintain objectivity in even though it is a very subjective matter we're deciding on."[251] Indeed, chapter 3 of this report highlights the ambiguity of CPLA's multiple goals and their amenability to different interpretations by different political interests.

Many observers of the land tenure reform process describe LINZ's role as referee,[252] while LINZ officials describe themselves as the "fair umpire."[253] In drafting legislation authorizing the process, LINZ's role was "envisaged as the honest umpire who would make the rule."[254] As LINZ is the umpire or referee, the service providers describe themselves as a "melting pot" of all the different opinions regarding a pastoral lease.[255] The melting pot must be neutral, not favouring one interest over another.[256]

According to the Commissioner, passage of the CPLA freed him from making "political decisions," and allowed him to be an administrative operator – making statutory decisions, and just implementing the law.[257] Decisions which had been political prior to CPLA are now administrative.

According to the Manager of Crown Property Management, the land tenure reform process takes place on the business, or operations, side of a very clear divide in LINZ between policy and operations.

> There's a split in LINZ between policy and operations, or between regulatory and business. The only place where the two sides work together is through the Manager of Crown Property Management. …

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[251] Commissioner of Crown Lands

While LINZ is not required to achieve consensus, the sooner all parties agree to a land division, "We are looking for consensus if possible. If we can get everyone to agree, that are decisionmaking process becomes much easier, doesn't it? And In a lot of reviews, we do get consensus. We have made some changes in the process which makes the process of getting to consensus quicker." (Manager of Crown Property Management)

[252] Recreation and conservation advocates

[253] Manager of Crown Property Management

[254] former policy adviser to Minister Dennis Marshall

[255] LINZ contractor

[256] LINZ contractor: But "government affirmed on that the Department of lands was the landholder, and was acting in the Crown's interest as lessor." It also seemed that "given DOC 's advocacy role, a separate department would give a more equitable result" than DOC . "Natural justice suggests that someone with an advocacy role shouldn't be the decision maker." The land act required a very definite decision-making role for government because the Commissioner was the statutory landholder under the land act. Therefore, tenure review could never have been configured as a direct negotiation between the farming family and DOC.

[257] "Before the CPLA, the commissioner had to make political decisions. Now I have the law to back me up." (Commissioner of Crown Lands)

> Yes, there is a clear divide between policy and operations. … Tenure review does not take place on the policy side. Tenure review is an operational function of our department. All the Christchurch people and all the people on this floor [in Wellington] are all operational.

Among New Zealand agencies, this administrative structure is not unique to LINZ, but became prevalent during the market and administrative reforms of the 1980s.

> This is a stock standard, policy-operations split in New Zealand agencies. This split has been around for 20 years now. It was part of the 1980s reforms. All the authority for tenure review has been delegated to the operations side. The regulators regulate, and the operators operate. But the decisions for tenure review are all made on the operational side.[258]

Similarly to the CPLA relieving the Commissioner of the burdens of making a political decision, rather than administrative, the policy-operations split enables operators to work “outside the washing machine of politics,” according to the Tenure Review Manager in Christchurch.

One recreation advocate sees the managerialism within LINZ and its resulting displacement behaviour as causes for failure of the reform process.

> LINZ's myopic, bureaucratic attitude creates results contrary to the goals of the law and to the stated policy of the government of the day. The tick-the-box mentality by people with no field aptitude leads to results that don't meet the objectives of the Act. The object [for the bureaucrats] is completion of the process, not the objects of the Act. This results in a total perversion of the Act. … All they're worried about is ticking boxes. Quality of the results is not a concern.[259]

But according to the Commissioner, the distinctions of politics vs. administration[260] and policy vs. operations must remain strong in order to avoid agency capture. "One reason I exist is to stop members of Parliament from doing favours for their mates with Crown lands." This neutral stance and protection against capture is built into the process of repeated consultation

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[258] Manager of Crown Property Management

[259] interview with recreation advocate

[260] Another reference to this split is from the Tenure Review Manager in Christchurch: "That's a political argument [whether grazing maintains or damages native grassland ecosystems], and we don't get involved in it."

and innumerable steps described in a 37 page flow-chart[261] for service providers to complete.[262] In effect, the process appears to be designed try to avoid politics altogether.

Agency officials, recreation-conservation advocates, and contractors state that having a neutral administrative agency in charge (rather than DOC, an agency with a legal mandate favouring conservation and recreation) is the best way to achieve a fair and unbiased outcome.[263] According to a contractor, "There's … a sense of natural justice about the process, that an agency with an advocacy role (DOC) should not be the decision-maker. You'll get a more equitable result if the decision-maker does not have an advocacy role."[264] And a recreation advocate says that LINZ *should* be (perhaps more) vigilant at maintaining neutrality: "The decision-maker [LINZ contractor] is in the middle. The arrival at an outcome is very much dependent on the contractor, acting on behalf of the Commissioner. That's an enormous responsibility on the contractor to come up with a fair outcome. This is a one-off opportunity, once it's in freehold it's not coming back. … In order to get a fair and unbiased outcome, you need a fair and unbiased LINZ."[265]

But striving for a fair outcome by adhering to administrative neutrality does not allow for any advocacy role for the Crown agency in charge. And it does not appear to allow for any politics in the determination of what the aforementioned "fair outcome" might look like. But attempting to eliminate politics on one side of a negotiation all but ensures that the other, avowedly political, side will win big. In this case, the Crown agency in charge is also the

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[261] Land Information New Zealand, "Tenure Review Process Operational Guidelines," (Christchurch: LINZ, 2004).

[262] According to the Commissioner, land tenure reform is a convoluted process because "it is capable of being sidelined by any of the interests so it has to have a strict process." The consultation and information gathering makes it a long process.

[263] According to an FMC advocate, LINZ should be neutral because it is deciding on the fate of crown land that is currently used as exclusive use for a business. Tenure review is a means of reallocating land formally vested in the crown into a fairer outcome. A more fair outcome is some land becoming truly public, and some land becoming truly private. That's why it's so important to get this right. LINZ administers process, awards contracts, and ultimately the decision to sign off is the Commissioner's personal decision. After the Commissioner has signed, there's no room for appeal. LINZ says they do their best to be unbiased. But you "can't expect them to say anything different, can you?"

[264] LINZ contractor

[265] FMC representative

statutory representative of the Crown as landholder. So attempting to take a neutral stance neutralizes the Crown's status as landholder.

Some observers of the land tenure reform process think LINZ *should* advocate for the Crown interest,[266] and many think that LINZ *is* advocating for the Crown.[267] But contractors and officials are firm in their commitment to a neutral lack of advocacy for either side. The contractor has "got to display impartiality based on the Act."[268]

And the Manager of Crown Property Management states firmly that his agency's role is:

> not advocacy. In fact I would object if you wrote a paper saying that we advocate in negotiations. My role is not advocacy. I operate to comply with the objects of CPLA. My position gives the authority to comply with the objects of part two of the CPLA. … As long as we comply with the objects of the Act, our jobs are done. I do not advocate. My job is to do this [pointing do his copy of the CPLA]. We work to achieve government goals, but we do not advocate.[269]

According to staff, LINZ does not need to advocate for the Crown's interest because the Crown interest is written into the CPLA statute and designed into the administrative process of land tenure reform. Underlying this is the assumption that the process itself finds the just result, so staff and

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[266] According to a recreation advocate (a different advocate from the one above who stated LINZ should be neutral): "LINZ has been given the role as negotiator on the Crown's behalf. LINZ's interest in the process are protecting and advocating for the Crown's interest. LINZ should be doing the job for the Crown. That's what it's there to do." (A Forest and Bird staffer expressed similar sentiments.)

[267] interviews with Forest and Bird volunteer; FMC volunteer; recreation advocate

[268] LINZ contractor

[269] The Manager of Crown Property Management gives an example of working administratively to achieve government goals of conservation without *advocating* for conservation:

"For example, the current government has a goal to create national parks. Following the Nature Heritage Fund purchase of Ahuriri, the government set a priority to create Ahuriri National Park and asked us, can we work to make that happen? So in order to contribute to the government goal of creating national parks, we prioritized Dingleburn, Longslip, and Ben Avon tenure reviews because those stations and conservation land that came out of them were important to the establishment of the national park. So in order to accomplish the goal, we pushed harder to complete these tenure reviews. Our role is not to push harder for more conservation land in individual tenure reviews, because we have got to do this [pointing to the act]. Pushing for more conservation land than is appropriate would violate the Act, but in order to support the government goal of establishing national parks, we can push harder to push the tenure review deals through. In the end, DOC will double the size of the park and be quite happy. And so will the government. By pushing harder to get three reviews through, we were supporting the government goal to establish the park. … This doesn't mean that we are pushing harder for more land, we just push harder on the program management side."

contractors do not need to advocate for it. The administrative realm is quite capable of producing just results without any advocacy contributions from the political realm.

> Advocating for the Crown is not really with process is about. It's not about advocacy. The process finds outcome. The outcome is not predetermined. The objectives are defined in the CPLA, but the CPLA enables meeting the objectives, it does not prescribe how to meet them. … [For example] one objective of CPLA is to 'make easier the securing of public access' [the objective] is not [the actual] securing of public access itself. You have to really read the words of the CPLA. Flexibility has been written into the act. It if it were a prescriptive act, it would be an exercise in acquisition.[270]

In sum, LINZ does not advocate for three reasons: 1) it would violate its neutral stance; 2) advocacy is DOC's job, not LINZ's; 3) LINZ does not need to advocate because the administrative process produces the results, not political advocacy. On top of this procedural reluctance to advocate, LINZ is prohibited from stating a fixed position on many issues – summer grazing for example – because the non-prescriptive nature of CPLA and the rules of the consultation decision-making process require the agency to look at every issue on a case-by-case basis. "If we had a rigid policy, it would be in violation of the rules of statutory consultation."[271]

It's consultation, not negotiation

In line with the professed political neutrality of administrative splits and dichotomies, the rules of the decision-making process itself – consultation – prohibit LINZ from advocating. When promulgating regulations or other subordinate legislation, New Zealand government agencies traditionally consult interested[272] and affected parties.[273] Consultation has been the crux of land tenure reform since its inception.[274]

NZ statute and case law prohibit the agency from entering consultation with a pre-determined proposal, and direct the agency to maintain a

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[270] Tenure Review Manager in Christchurch

[271] Tenure Review Manager in Christchurch

[272] This duty to consult arises from the need to act fairly with respect to the interests. Queenstown Lakes District Council, "A Guide to Resource Management Act Consultation in the Queenstown Lakes District," (no date).

[273] Commissioner of Crown Lands, "Tenure Review 'Consultation'," (Wellington: LINZ, 2002).

[274] Interviews with Commissioner of Crown Lands, and a LINZ contractor

willingness to change course pending findings in consultation. A guide to consultation under New Zealand's Resource Management Act describes consultation as "a genuine exchange of information between affected and interested parties, applicants, and decision makers before a decision is made."[275] Consultation thus involves "the statement of a proposal not yet finally decided upon;... listening to what others have to say in considering responses;... keeping an open mind and being ready to change in even start again;... [consultation is] not just a presentation [of a decision] -- it's an exchange."[276]

Consultation differs from negotiation,[277] in which each party has a clearly identified desired outcome for which it uses power[278] to advocate. [279] Each party in a negotiation then bargains and compromises to achieve a negotiated outcome, always using veto power -- the ability to leave the process -- as his most powerful bargaining tool. While consultation involves gathering ideas and opinions that contribute to a decision, “negotiation is an exercise of power, or lack thereof, tempered by a party’s decision whether to exercise the power they have. But its success depends critically on parties who believe they will satisfy their interest better by working together, perhaps

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[275] Queenstown Lakes District Council, "A Guide to Resource Management Act Consultation in the Queenstown Lakes District."

[276] Ibid.

[277] Consultation and negotiation are different again to mediation, which is “a form of negotiation, where two or more disputing parties engage in negotiation with the presence of a neutral third party, a mediator, who assists them in their effort to arrive at a settlement. And, like negotiation, it is not for every dispute. The parties choose mediation because they want to settle, they want the privacy of a confidential mediation process, and they see this process as a way of resolving their dispute more quickly and on their own terms, than would be possible by going to court, the principal’s office, a discipline board, grievance process, or some other alternative. There is usually not a winner and loser, but each side perceives a partial win for itself. After all, if there were going to be a clear winner, the parties presumably wouldn’t take the time to engage in mediation.” Bruce Fraser, "The Mediator as Power Broker," in *Negotiation and Power in Dialogic Interaction*, ed. Edda Weigand (Philadelphia, PA: John Benjamins Publishing Company, 2001), p. 31.

There are two factors distinguishing LINZ’s role of referee or umpire from that of mediator: 1) this is a consultation, not a negotiation; and 2) the two parties (DOC and the lessee) are not of equal standing, as the lessee has a recognized vested interest while DOC does not.

[278] “… absolute weak parties do not negotiate, they surrender. And, absolutely strong parties do not negotiate, they conquer” (Nicolaidis 1999: 103) quoted in Ibid., p. 30.

[279] The co-director of an advocacy group for lessees, the High Country Accord, describes land tenure reform as “not a negotiation, but a consultation” in which the Crown consults with the lessee (and other parties) on “his interests and goals.”

even failing to exercise some of the power they have, than by operating apart."[280]

By contrast, according to the Commissioner of Crown Lands,[281] the highest "statutory duty of consultation is to have an open mind," to be open to different opinions, and to be willing to consider the other side. Consultation is not about taking sides, but "listening with an open mind and making your own decision."[282] According to the Tenure Review Manager in Christchurch, consultation is not a political process like negotiation, in which two parties use power to battle it out. But "we do our jobs and advertise outcomes. We stay out of the political debate. The definition of consultation is to seek and understand all views." After the consultation, the contractors "use their technical expertise" to analyze the advice from all sources and make a recommendation to LINZ for a decision.[283]

Following NZ case law, LINZ official documents state in no uncertain terms that "consultation [is] not to be confused with negotiation or decision making."[284] While some observers might view the process as a negotiation between the lessee and DOC, "that's not true. Both parties are being consulted by the contractor."[285] A contractor to LINZ affirms that the process is most definitely not a negotiation, and certainly not a negotiation between the farmer and DOC. The land tenure reform process is an amalgam of different perspectives brought forth in consultation. The contractor is the "melting pot" of views, who puts all the views brought forth in consultation into the context of all the other views, and put that amalgam of views into context of the law. The contractor then issues a report to the assessors at LINZ, who review the report and make sure that it is factually sound and logically coherent, checking that the conclusions follow logically from the nominally factual findings.[286]

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[280] Fraser, "The Mediator as Power Broker," p. 30.
[281] The Commissioner noted in the interview that he is making reference to the Wellington Airport case.
[282] Manager of Crown Property Management
[283] Tenure Review Manager in Christchurch
[284] Commissioner of Crown Lands, "Tenure Review 'Consultation'."
[285] Tenure Review Manager in Christchurch
[286] A LINZ contractor

While case law is not prescriptive as to form or duration of consultation,[287] it is clear that the agency should *not* have a pre-ordained decision.[288]

> To consult is not merely to tell or to present. Nor is it, at the other extreme, to agree. Consultation does not necessarily mean negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate stage involving meaningful discussion. … It is implicit that the party required to consult, while quite entitled to have a working plan already in mind, must keep its mind open and ready to change and even start afresh. … Beyond that, there are no universal requirements as to form. … Nor is there any universal requirement as to duration. … Generalities are not helpful.[289]

The only other directions from case law are that: 1) consultation is to start at the "formative" stage of decision-making;[290] 2) and all parties must be treated fairly.[291] In this sense, according to Tenure Review Manager in Christchurch, if LINZ were to advocate for designating more land for conservation, it would turn the process into an acquisition exercise and violate the terms of consultation because LINZ would be adhering to a pre-ordained

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[287] But land tenure reform consultations do have a series of steps:
1. identify affected parties
2. give them sufficient info to make informed comments
3. "ensure decision maker has all relevant information before him or her" (according to contractor)
4. allow enough time for public comment
5. allow for comments on the comments
6. "listen to what parties have to say with an open mind (ie be prepared to decide either way)." "In consultation, the contractor's views are not important – the views of the interested parties are … The contractor's job is to: develop alternate proposals; elicit the views of affected parties on these proposals; and present these to the decision maker who then decides on what proposal to make." (according to Tenure Review Manager in Christchurch)
7. notify public of decision

G.D.S. Taylor, *Judicial Review: A New Zealand Perspective (Supplement to 1991 First Edition)* (Wellington: Butterworths, 1997), Commissioner of Crown Lands, "Tenure Review 'Consultation'." following Taylor, *Judicial Review: A New Zealand Perspective (Supplement to 1991 First Edition)*.

[288] *West Coast United Council V Prebble*, unreported J McGechan CP47/88 (1988).

[289] Commissioner of Crown Lands, "Tenure Review 'Consultation'." citing *Wellington Interational Airport Ltd V Air New Zealand*, 1 NZLR 671 (1993). applying principle from Port Louis v Atty General of Mauritius.

[290] Commissioner of Crown Lands, "Tenure Review 'Consultation'." (citing R v Sutton London Borough Council)

[291] *R V Brent London Bureau Council, Ex P Gunning*, 84 LGR 168 (QBD) (1985).

decision.[292]

West Coast United Council v Prebble[293] established that "informing" does not constitute consultation. Hence DOC's role in the tenure review process is not a consultator, but a consultee. Consulting is also not merely informing interested parties of a pre-made decision, without willingness to change position. "Consulting involves the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done."[294] Further, "a decision-maker [in this case the LINZ contractor, and ultimately the Commissioner] must not have a closed mind to what the person being consulted has to say … [and] a decision maker must conscientiously take into account what has been put forward."[295]

Hang on, What about DOC?

What about DOC? If the dichotomous administrative model and case law definitions of consultation prevent LINZ from advocating for the Crown interest, it would seem that DOC would stick up for the Crown's interest. Doesn't DOC take the political role of "sticking up for the Crown?" In short, no.

DOC is not an effective advocate for the Crown for two reasons: 1) DOC's goals are narrower than the Crown's; 2) DOC has less power than the Crown because it is not a vested interest, and hence does not have veto power. The Department of Conservation's organic act, the Conservation Act of 1987, authorizes DOC both manage the land it administers "for conservation purposes"[296] and "to advocate the conservation of natural and

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[292] Tenure Review Manager in Christchurch (Incidentally, this is likely also the root of the vertical integration issue in land tenure reform, or a principal-agent problem to a political scientist, and why Parliament has published the same High Country Objectives repeatedly.

[293] *West Coast United Council V Prebble*.

[294] Commissioner of Crown Lands, "Tenure Review 'Consultation'." citing *West Coast United Council V Prebble*.

[295] Commissioner of Crown Lands, "Tenure Review 'Consultation'." citing *Hamilton City V Electric Distribution Commission*, NZLR 605 (1972).

[296] The Conservation Act §6(a). And the Act specifies that "'Conservation' means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations." In other words, conservation comprises preservation of values and provision of recreation opportunities and access.

historic resources generally."[297] Just as DOC has management and advocacy authority for conservation, it has two roles in land tenure reform: advocate for conservation-recreation in the consultation process; and provide scientific advice to LINZ on identification of significant apparent values on pastoral land in the required Conservation Resources Report and when asked.

Some observers and participants see DOC as advocating for "the public interest."[298] But that view is predicated on the assumption that conservation and recreation comprise the public interest in its totality. Not wishing to define such a potentially treacherous term as the "public interest," this chapter instead examines the "Crown interest," as defined in the goals of the land reform governing statute:[299] 1) promote ecologically sustainable management of pastoral land; 2) protect significant inherent values of conservation, recreation, heritage, and landscape, "preferably" via Crown ownership; 3) facilitate diversification of land use through freeholding pastoral lease land with potential for economic production; and 4) facilitate recreation access to high country.[300]

These goals are much broader than DOC's goals of preservation and providing recreation opportunities. Crown goal number three is not covered by DOC goals, and number one is only marginally.[301] Further, if we expand our definition of Crown goals to include data sources such as cabinet papers, policy documents published by LINZ, and interviews with LINZ officials, two more goals emerge: 1) getting a fair financial return for assets sold in land tenure review; 2) creating an "economically viable unit" of freehold land for the farmer coming out of land tenure reform. DOC's advocacy role covers neither of these two additional Crown goals. While DOC advocates for conservation

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[297] The Conservation Act §6(b)

[298] Fish and Game representative, Forest and Bird staff, Forest and Bird volunteer

[299] however ambiguous, value-laden, and potentially conflictual they may be (see chapter 3).

[300] paraphrased from CPLA §24

[301] The Resource Management Act of 1991 recognizes DOC as an advocacy group, free to lobby on behalf of conservation. Hence it may submit opinions on proposals to develop or otherwise change management patterns on private land. Under the Biosecurity Act of 1993, DOC has authority to control potential bioinvasions (weeds and pests) on private land and charge the owner. But within the context of land tenure reform, DOC's emphasis is on the future conservation land, not the future management of freehold land.

and recreation, the agency's goals and interest are far narrower than the Crown's, as defined by the CPLA, policy documents, and interviews. DOC lacks the legal mandate to advocate for diversification of land use, financial return to the Crown, and economic viability of the future freehold block. Put simply, these Crown goals are outside the purview of DOC.

Further, DOC has less bargaining power than LINZ. LINZ represents the Crown's interest in, and title to, the pastoral estate.[302] As such, the Crown can withdraw from land tenure reform at any time, while DOC cannot. LINZ has veto power, while DOC does not. LINZ is the "locus of power,"[303] leaving DOC at a weaker arguing stance as DOC does not own the land and does not run the process.[304] The CPLA requires the Commissioner to ask for DOC's advice, but does not require him to heed the advice.[305]

There are varying reports of DOC's leverage in the land tenure reform process. A lessee and former president of the High Country Committee of Federated Farmers estimates that DOC's actual influence exceeds expectations based on the agency's lack of property rights in the pastoral estate and its official role as adviser.[306] By contrast, an observer and landscape advocate opines that DOC's lack of leverage is reflected in the results.[307]

According to Fraser (2001), the most powerful bargaining chip in negotiation is the ability to walk away, or veto power. As vested interests with compensable property rights, both the lessee and the Crown can veto any deal at any time. DOC cannot. As such, consultation with the lessee is very different from consultation with DOC. "The farmer has the ultimate right of

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[302] Commissioner of Crown Lands, "Tenure Review 'Consultation'."

[303] FMC representative

[304] DOC tenure reform manager, Canterbury Conservancy (Christchurch)

[305] Commissioner of Crown Lands; Manger of Crown Property Management; DOC tenure reform manager, Canterbury Conservancy (Christchurch); Forest and Bird staff

[306] this lessee distinguishes sharply between DOC's role as adviser and LINZ's role as decision-maker. "DOC is an interested party, but also a consultant. But at the end of the day, LINZ says deal or no deal. It's not DOC."

[307] According to a landscape advocate, DOC receives advice from professionals and advocacy groups on how much land should be protected for conservation. From the initial advice, to DOC advice to LINZ, through to the final result, "very rarely does the process produce more conservation land. It just gets worse." If DOC had enjoyed more power in the process, this observer posits that more land would be reserved for conservation.

veto, and none of the other parties has the right of veto. LINZ has the right of veto, but it is the party doing the consulting, not being consulted."[308] In other words, as LINZ is the self-proclaimed neutral arbitrator of consultations, it is less likely to exercise its veto power than if it were to assert an advocacy role.

Result of Dichotomy: No one sticking up for the Crown

DOC advocates for its interest – recreation, conservation, and landscape. But it has limited bargaining power, as it has neither a vested property right nor veto power.

LINZ has both a vested interest and veto power. But LINZ is running the process as a self-proclaimed neutral referee. An agency cannot be neutral at the same time as it advocates for the Crown's interest. Instead of exercising its veto power and its property right,[309] LINZ is the "fair umpire." When writing the authorizing statute for land tenure reform, legislators envisioned this referee role. But giving the so-called neutral role of judge and process administration to the same entity that represents the Crown's property right ensures that one of these roles will suffer.

“Neutral" administration of the process, (regardless of whether neutrality actually exists) is different from the more political task of advocating for the Crown interest. LINZ is favouring the administration side, emphasizing its goal to be the "neutral," "unbiased," "fair," and "objective" "umpire."[310] As LINZ cannot simultaneously act neutrally and advocate, it abdicates its rights and responsibilities to advocate for the Crown's property interest. Hence choosing the administrative side of the dichotomy to the exclusion of politics is leading to a situation in which no one is sticking up the Crown.

Discussion

In sum, case law directs the agency to enter consultation with no preconceived decision, to listen with an open mind to all parties, and to amalgamate all the views into a decision which does not favour one interest over another. The problem is that the Crown itself is an interest. And LINZ’s

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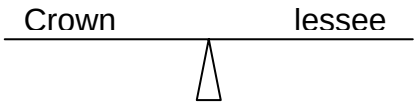
[308] A LINZ contractor

[309] according to the manager of Crown Property Management, the Commissioner has threatened an outright veto once in 67 deals.

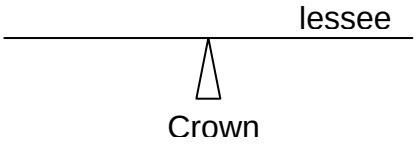
[310] These are terms repeated in interviews with the Commissioner, Manager of Crown property management, and the tenure review manager in Christchurch, as well as several observers and participants.

dual role of neutral referee and representative of the Crown interest effectively neutralizes the Crown interest. This neutrality leaves no one to advocate for the Crown, and tips the scales of the decision heavily towards the farmers.

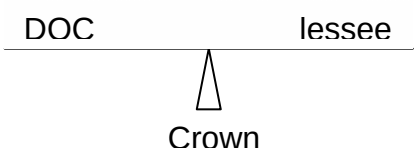
If land tenure reform were a process of negotiation instead of consultation, a diagram of it would look as follows:[311]



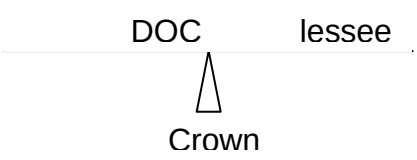
But as it is a consultation, not a negotiation, with the Crown as referee, the process instead looks like this:



An observer might be tempted to put DOC opposite the lessee in the decision-making:



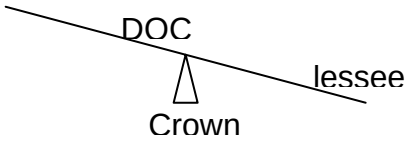
Yet DOC is not a vested interest as are the Crown and the lessee. So DOC wields less power, and advocates for a narrower agenda than that encompassed by the Crown interest as defined by the governing statute. So the diagram looks more as such:



LINZ neutrality leads to a lack of advocacy for the Crown, which in turn leads to the farmer advocating and the Crown agent listening with an open

[311] I thank Jean McFarlane for translating my incomprehensible hand-waving into the teeter-totter metaphor.

mind. Ultimately this produces a result that, on its face, appears biased towards the lessee. This result engenders the very producer capture that public choice and the NZ model of public administration seek to avoid.



The concept of administrative neutrality takes root in the politics-administration dichotomy. [312] The dichotomy has been configured and reconfigured countless times in the literature – its most recent revitalisation in the policy-operations split of managerialism.[313] I am not suggesting another reconfiguration. But these findings certainly raise questions about the goals and administrative tools that are common to the split and the dichotomy. This research finds that the avowedly mythical tool of administrative neutrality does not yield the neutral, or uncaptured, results as hoped. Quite the opposite in fact. This case out-captures agency capture.

Re-examination of the dichotomy, the split, and their shared goals and tools yields contradictory conclusions. Firstly, it becomes clear that the tools employed (so-called administrative neutrality enforced via a policy-operations split) to achieve a goal (avoiding capture) are fundamentally flawed. The results of land tenure reform appear strongly biased towards the agricultural production interest, and look exactly the opposite of the sought-after uncaptured results. But secondly, it becomes clear that these tools are inconsistently and incompletely applied, regardless of their adequacy. [314]

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[312] See generally Campbell and Peters, "The Politics/Administration Dichotomy: Death or Merely Change.", B. Guy Peters, *The Politics of Bureaucracy*, 5th ed. (London: Routledge, 2002).

[313] See especially Boston et al., eds., *Reshaping the State : New Zealand's Bureaucratic Revolution*.

[314] This paper does not suggest throwing the whole notion of an independent civil service out the window in favor of the old spoils system. Indeed some attempts at structural separation between political advocacy and administration can be positive. Perhaps the land tenure reform process ought to have followed the dichotomy a bit more closely, by vesting authority over the Crown's interest in the land in a separate entity from the agency in charge of administering the redistribution process. This configuration would assign DOC to advocate

Are the tools inadequate, or were they misapplied in this case? It appears that both of the above are true, especially the latter. While scholars have long deemed the dichotomy inadequate, impractical, and indeed impossible, it remains the administrative tool of choice in many cases of policy implementation, including this one.[315] If the dichotomy is going to be used in any form, policy-makers and administrators should at least apply it consistently.

In this case, the process places too much faith in the neutrality of administrators, and on the robustness of the policy-operations split within LINZ. LINZ represents the Crown's vested interest, but is also expected to act as the neutral umpire. It cannot simultaneously act neutrally and represent the Crown's interest in the land.

If designers of the statute governing land reform envisioned the administrators of the process as so-called neutral referees, then legislators cannot expect the same administrators to represent and stick up for the Crown's vested interest in the land. Since the process is based on the administrative neutrality born of a strict separation of politics and administration, albeit a mythical split, administrators and contractors who are striving to be neutral cannot represent the Crown's interest.

Analysis to this point has painted government officials as rather passive participants, and their lack of advocacy for the Crown interest as merely a by-product of their perceived mandate to maintain neutrality. It is worth considering that officials and their trusted dichotomy (or split) play a more active role, and that the dichotomy might survive because it serves the goals of both legislators and administrators. Without delving into the realm of conspiracy accusations, the dichotomy offers a cloak of cold, technical neutrality behind which agencies can hide, when they don the cloak of neutrality in order to divert public attention away from borderline nonsensical

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for conservation and recreation, the lessee to advocate for the lessee, LINZ to advocate for the Crown, and an independent tribunal (perhaps the existing Land Valuation Tribunal, for example) to make the decision. This configuration would in fact give more credence to the dichotomy, by distributing the political advocacy and neutral arbitration roles to separate entities. I do not suggest that the independent tribunal would be either neutral or objective, but neither would it have a dual mandate of neutrality and representing the Crown interest.

[315] Peters, *The Politics of Bureaucracy*.

policy results. According to Peters, the dichotomy's usefulness to both administrators and politicians is an important reason for its survival for over a century despite its widely acknowledged fallacy.

> [It is worth] noting the survival of the ancient proverb of public life that politics and administration are separate enterprises and that such a separation is valid both in the analysis … [and] in the actual conduct of public business. Although any number of authors has attempted to lay this proverb to rest, it has displayed amazing powers of survival and reappears in any number of settings in any number of political systems.[316] … What does the artificial separation of these two activities assume to do that makes the survival of this ''useful fiction'' so desirable for both sets of actors? For administrators, this presumed separation of administration and politics allows them to … engage in policy making — presumably using technical or legal criteria for their decisions — without the interference of political actors who might otherwise recognize political or ideological influences on policies …[317] Thus, the actions of administrators may be regarded by politicians, the public and even by themselves as the result of the simple application of rational, legal, or technical criteria to questions of policy. This apparent professional detachment may make otherwise unacceptable decisions more palatable to the public.[318]

But this analysis will not go too far down the road of conspiracy theory as statute, case law, the Westminster administrative tradition, and the dominant New Public Management model all push LINZ towards its stated position of neutrality, at least indirectly.

On the topic of caution, the strengths, weaknesses, and necessities of the research design of this study bear examination. Reliance on a research design at the macro scale means that analysis might ignore important details on the micro scale; and with financial data only available on a national and annual scale, local details of the land redistribution have been omitted. For instance, the difference between the land designation categories (freehold and Crown) is statistically significant,[319] but if examined on a smaller scale

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[316] Campbell and Peters, "The Politics/Administration Dichotomy: Death or Merely Change."

[317] Richard Rose, "Giving Direction to Permanent Officials," in *Bureaucracy and Public Choice*, ed. Jan-Erik Lane (London: Sage, 1987).

[318] Peters, *The Politics of Bureaucracy*, p. 182-83. citing Morris P. Fiorina, "Flagellating the Federal Bureaucracy," *Society*, no. 20 (1983), Joel F. Handler, *Down from Bureaucracy* (Princeton: Princeton University Press, 1996).

[319] A two-tailed t-test of absolute numbers in land results produces a p-value of 0.0075. And the test of the two sets of proportions is far more significant.

local differences emerge to offer alternate explanations for the results. For example, many leaseholders entered NZ's Protected Natural Areas Programme in the 1980s, relinquishing claims to portions of their leases to benefit conservation. Having already shifted some land into conservation reserves, those leases will yield fewer hectares for conservation in the land tenure reform process than leases that never entered the program.

Another possible limitation of the research design is the naïve optimism afforded to the interview data. Most notably, when LINZ officials said they are objective, apolitical, and neutral, this research does not measure their veracity and hence does not doubt them. There is of course substantial reason to doubt them, but these doubts do not affect the research findings.

Most broadly, we live in a post-quantum world in which objectivity simply does not exist,[320] even for laboratory physicists and much less for property rights redistribution administrators. More specifically, research reveals that consultation processes often live up neither to their ideals nor to their legal mandates.[321]

But these findings do not depend on whether LINZ officials and contractors are successful in their quest to be neutral and objective. Even striving for neutrality abdicates responsibility to represent the Crown's interest in the pastoral estate. This research does not reveal and cannot know first-hand what goes on in closed consultations.[322] But striving to achieve a perceived mandate of neutrality all but guarantees that LINZ officials will not advocate for the Crown, as that is not their perceived role. Just trying for

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[320] Among other things, both quantum and relativity theory revealed that there is no such thing as objectivity. Merely taking the measurement of an event changes the event itself (in the quantum case, collapsing the light wave into a particle). Hence the observer is part of the event, not an objective bystander. For more, see P. C. W. Davies, *The Ghost in the Atom : A Discussion of the Mysteries of Quantum Physics* (Cambridge: Cambridge University Press, 1986).

[321] Bronwyn Mary Hayward, "Effective Citizen Engagement and Social Learning in Environmental Policy: The New Zealand Experience," *Annual Meeting of the American Political Science Association* 2005 (2005).

[322] In closed processes with results that are only partially publicly available, there might be opportunity for corruption. But this research design neither looks for, nor suggests corruption. It just takes government officials at their word and examines the picture they paint.

neutrality precludes effective advocacy for the Crown interest, and tips the scales in favour of the lessees.

Conclusion

Land reform suffers from an inconsistent and incomplete application of a mythical administrative tool, the politics-administration dichotomy, which seeks to avoid agency capture in policy implementation. The tool itself is flawed, and its application here is not complete. LINZ is relying on a carefully crafted policy-operations split within the agency, but then assigning both the political advocacy and the so-called neutral administration to the operations side of the split. This neutralizes the Crown's vested interest in the land, and tilts the results toward the farmers. Neutrality, the dichotomy, and the policy-operations split are administrative figments of the 19th century scholarly imagination. But if applied at all, they must be applied throughout. In this case, the jobs of advocating for the Crown's interest and administering the process should be vested in different agencies.

Neutrality is a mythical and impossible goal. Eliminating politics from decision process of distributing valuable resources is ludicrous, futile, and in this case dangerous. It is ludicrous and futile because such decisions are inherently political. No matter how competent, morally upstanding, and well-meaning LINZ officials and contractors are, an attempt to eliminate politics will never succeed. Everything is political, especially land allocation. It is dangerous, because it has backfired. Instead of delivering the hoped-for unbiased result, it has out-captured capture theories of interest group politics.

This is not an indictment of LINZ. I have no data to support a claim that the agency's attempts at neutrality are anything but honest, competent, and well-intentioned. But placing "neutral" and "vested interest" in the same task description will not work. One will lose. In this case, it is the vested interest, the Crown, and ultimately the NZ people.

Figure 7: Public recreation access to new conservation reserve across 1.6 km of newly freeholded land. Down a long, bumpy dirt road, through two herds of sheep, somewhere in Central Otago, NZ.

Figure 8: New conservation land resulting from land tenure reform. Lindis Pass Conservation Area, August 2005.

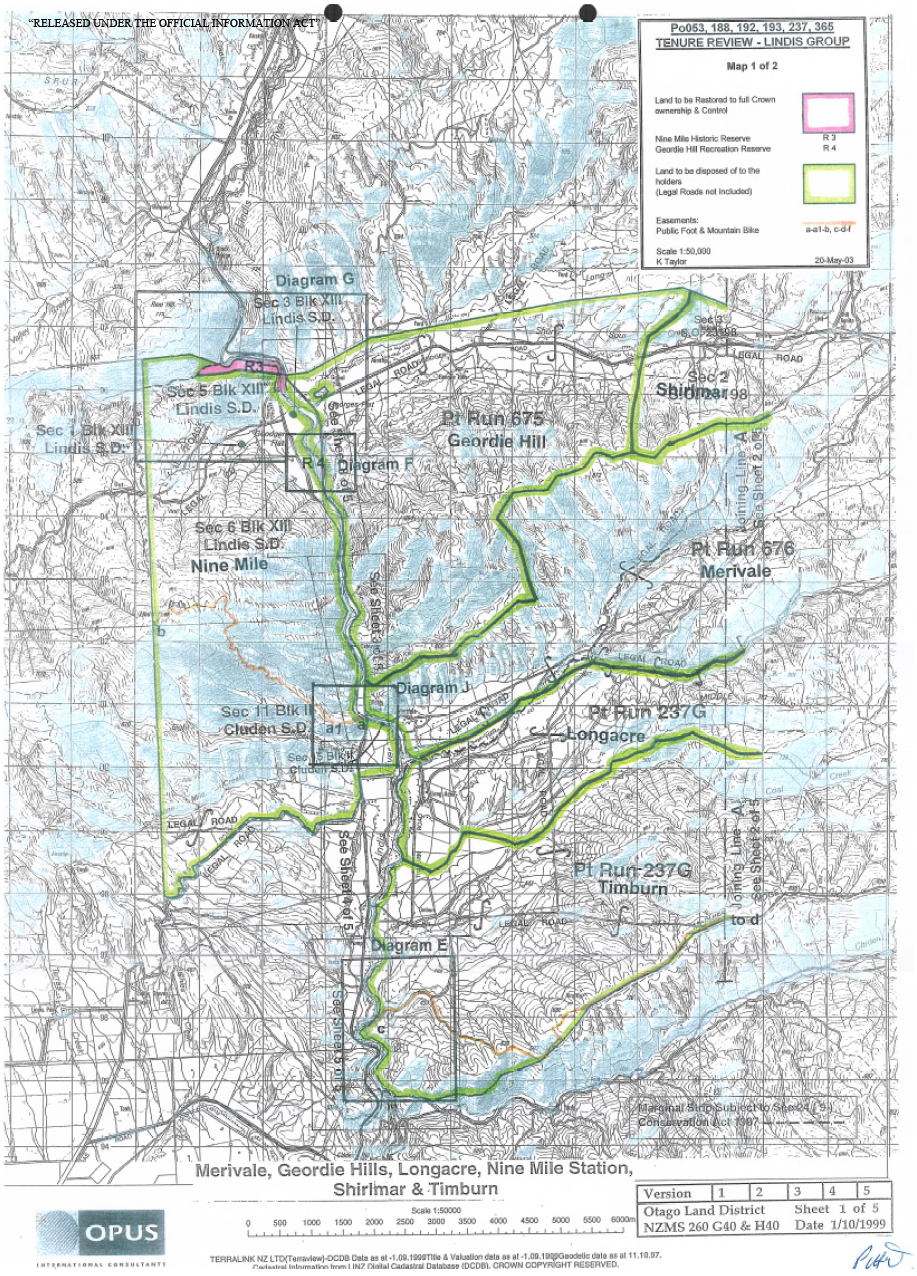

Figure 9: Designation Plan for the "Lindis Group" of pastoral leases.

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