The Freehold Option

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Introduction
Whereas the advantages of freehold are accepted for the rest of New Zealand, the same cannot be said of the High Country. Its multiple uses and sensitive nature are thought to require government’s directing hand, with government control thought preferable to private control. However, political and bureaucratic processes do a very poor job of managing natural resources, and the High Country would be better managed for all uses if it were entirely in freehold and out of the reach of politicians and bureaucrats.

With a bitter conflict now emerging over the use of the High Country, and with a new Land Act in the offing, perhaps the time is ripe to restate the argument that resources are best managed under a system of private property and free enterprise, and that rights to the High Country should not be subject to legislation and hence government control at all.

High Country values are subjective values
The case for freeholding requires that a great deal of muddled thinking be cleared away, and High Country values and the Protected Natural Areas Programme provide a good place to start. The PNA programme is a plan to survey the entire countryside, including the High Country, and identify and rank areas having nature conservation value. Other values, particularly æsthetic, spiritual and historic values, as well as
recreational use, are also being noted. The aim is to protect that land identified as having nature conservation value. "Following the initial phases of survey and data analysis, recommendations for protection contained in the survey reports must be implemented," and, "ultimately priority areas require security, preferably through central government legislation."2

The idea that land identified as having conservation value should be automatically protected is plain stupid. PNA surveys can compare different areas to assess their relative merit in terms of nature conservation, but they cannot assign a value to nature conservation itself. They cannot tell whether the areas they identify as Priority Protected Places should be protected or not. What ought to be done with a resource cannot logically be inferred from what the resource is.3 The value of the natural features of the High Country is not something resource surveys can measure because this value derives not from the High Country itself but from the minds of individual people, and judgements will vary from person to person, and from time to time for the same person. High Country values are subjective values, not objective values; they derive not from the object, i.e. the High Country itself, but from the subject, i.e. the human valuer.4 A PNA report concluding that certain areas of land should be protected is drawing not solely upon the report's objective and quantitative survey of natural

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2Ibid. at 55-56.
3The logical distinction between 'is' and 'ought' statements was recognised by DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. I, § I, last para. (1739).
4The rejection of objective theories of value, and their replacement with the subjective theory of value, along with marginal utility theory, distinguishes modern economics. The principal works are CARL MENGER, GRUNDSÄTZE DER VOLKSWIRTSCHAFTSLEHRE (1871), WILLIAM STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY (1871), and LÉON WALRAS, ÉLÉMENTS D’ÉCONOMIE POLITIQUE PURE (1874).
features, but upon someone's subjective preferences as well.⁵

High Country values then are not inherent in the resource, but rather derive from the minds of individual people, and land use planning of logical necessity must have regard to subjective preferences and not just the High Country's natural features and ecological character.

_resource allocation not the problem_

Another mistaken idea is that the problem the High Country presents is one of resource allocation. This idea follows from recognition of the High Country's multiple uses, diverse values and competing interests. For example, the Clayton Committee listed agriculture, recreation, habitat conservation, soil and water conservation, and the preserving of the balance of ecology, as competing interests, and noted that such a list was by no means exhaustive.⁶ In such fashion the problem is invariably construed as one of how to allocate High Country resources so as to achieve a good balance amongst these competing uses and interests. This, however, is emphatically not the problem.

The problem is not one of how to allocate High Country resources but one of how to use information that is not given to anyone in its totality.⁷ If all the relevant information about the use and potential use of the High Country were concentrated into one mind, and if this mind were given a set of preferences to satisfy, the allocation of the High Country would be but a matter of logic. However, the relevant information is not

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⁵See e.g., C.F. Brumley, M.W. Stirling, M.S. Manning, Old Man Ecological District: A Rapid Ecological Survey of Natural Areas for the New Zealand Protected Natural Areas Programme 2 (1986).
⁶CROWN PASTORAL LEASES AND LEASES IN PERPETUITY, REPORT OF THE COMMITTEE OF INQUIRY 9 (Wellington, 1982).
⁷The information problem resource allocation presents, and the part prices play in solving it, were described by F.A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 19 (1945).
concentrated in a single mind but is instead dispersed amongst the many minds of individual High Country users. This information is not of a specialist or scientific nature; rather, it is everyday information about particular circumstances of time and place. An example is the information the successful farmer has of the particular conditions and special circumstances of his farming enterprise. Another example is that special place for a group of trampers, with the relative value each assigns that place something only each individual can know. This is the information that is relevant in deciding High Country use, and it is information that cannot be concentrated into one mind or one group of minds.

The problem the High Country presents is thus not how to allocate the resource amongst competing interests, but rather how to make use of the relevant information when it is not given to any one mind in its totality. It is a problem of how to secure the best use of High Country resources known to New Zealanders, for ends whose relative importance only individual New Zealanders can know.

Markets beat public administration
The only way to make use of each individual's unique knowledge is to leave decisions depending upon that knowledge to the individual. The need for decentralised decision making is especially evident when it is considered that particular circumstances of time and place are not static but are constantly changing. Constant changes in farming conditions, for example, make it imperative that decisions be left to individual farmers. Rapid adaption to changing circumstances cannot possibly be achieved if all relevant information has to be communicated to a central office, which, after integrating all information, issues its orders. Decision making must be decentralised so that information about particular circumstances
of time and place can be promptly used.

It is not enough, however, to have the "man on the spot" deciding solely on the basis of his limited but intimate knowledge of the facts of his immediate surroundings. The information that he needs to fit his decisions into the entire pattern of the changes of the larger economic system must be communicated to him. This is the part that price changes play; they convey in summary form just that information needed for people to co-ordinate their resource use.

For example, imagine that somewhere in the world a new and valuable use for wool has arisen, or perhaps wool production has fallen because of bad weather. Wool is now scarcer. Wool users need to economise on wool and producers need to divert more resources to wool production. Such a result is brought about simply and effectively by the rise in price occasioned by the scarcity. And the effect rapidly spreads throughout the economic system as the price of wool products, and of the resources necessary to wool production, also rise, and so on. No one oversees the entire system to organise the response; rather, people just make use of their own limited knowledge of their own particular circumstances of time and place, and the price system provides for overall co-ordination.

Farmers responding to price changes are thus adjusting their plans so they better mesh with the plans of countless millions of individuals around the world. They are thereby working in with people and events of which they are not even aware, nor could be aware. In comparison, politicians and bureaucrats responding to political pressures and problems are but responding to those people and events of which they have immediate knowledge. It is simply untrue then that Crown ownership and public control of the High Country allows the preferences and
interests of a far greater number of people to be taken into account than do private ownership and private control. Indeed, the reason interest groups favour Crown ownership and public control is that it opens up opportunities for High Country use to be decided with reference to only a very narrow range of interests and with regard to only a few people's preferences.

**Private property ensures resource management**

The institution of private property allows the unique information that each individual has of particular circumstances of time and place to be put to good use. It does this by conferring upon individuals the *authority* to act, while at the same time rendering them *responsible* for their actions. The freehold farmer, for example, is free to use his land as he chooses, subject, of course, to his respecting his neighbours' property rights. The farmer's actions, in turn, are tempered by the system of profit and loss. In a free market the farmer's actions are unconditionally and totally subject to the sovereignty of the buying public, and profit and loss are generated by his success or failure in adjusting the course of his production activities to suit the most urgent demands of consumers. To survive he must provide a product that consumers want at a price they are both willing and able to pay.

The position is quite different for politicians and bureaucrats. They are accountable not through the system of profit and loss, and hence to the daily and repeated decisions of consumers, but through the electoral system and the occasional decision of voters confronted with a quite limited choice. Public land therefore provides less public accountability than does private land, not more.

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Sound resource management requires that property be not only private but also secure. Secure property is what allows people to plan their resource use. A farmer, for example, is able to plan his operation because he is reasonably sure of the resources he can call upon for his purposes. Moreover, with his property secure he is encouraged to invest his profits back into his farm so he can better meet the demands of the public. Private property thus provides for prosperity by encouraging capital accumulation. Private property likewise encourages resource conservation because people husband resources if property in them is secure. For example, the freehold farmer conserves his soil confident that it is he who will benefit by his maintaining and improving the productivity and hence value of the asset. Were property insecure he would instead be encouraged to take as much out of the resource as he could. Secure property is thus a prerequisite for resource conservation.

Secure property is essential also to the maintenance of peace and harmony. Neighbours are not at constant war over land because their respective rights are clearly delimited and respected. One need only consider the consequences of having boundary fences relocated every three years by political process to understand the important part private property plays in securing peace and harmony. As David Hume perhaps a little optimistically noted long ago:

No one can doubt, that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that after the agreement for the fixing and observing of this rule, there remains

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little or nothing to be done towards settling a perfect harmony and concord.\textsuperscript{10}

\textit{Environmental entrepreneurs v. environmental activists}

People value the High Country not just for the meat and wool it can produce but also for its natural features and the recreational opportunities it affords. At present nature conservation and recreation are considered non-commercial uses, not because of the inherent nature of these uses, but because government has taken it upon itself to provide for them.\textsuperscript{11} Agriculture itself would be rendered a non-commercial use if it were taken over by a non-profit department of state. In contention is thus not how government should best provide for nature conservation and recreation, but whether government should be involved at all.

For example, imagine an area of High Country land that nature lovers value for the native plants it supports, but which the leaseholder intends to oversow and topdress. The clash of interests can be approached in either of two ways. The first is where the government shows itself ready to become involved in potential conflicts between conservation and development.\textsuperscript{12} Nature lovers are thereby encouraged to become environmental activists and lobby government to use its coercive powers to prevent the farmer from developing his land. The conflict will prove a bitter one as the farmer is unlikely to forgo the benefits of agricultural production, and more particularly, surrender his rights, without a fight.\textsuperscript{13}

The second approach is where government shows itself to be unwilling

\textsuperscript{10}Hume, \textit{supra} note 3, at bk. III, pt. II, § II, para. 10.


\textsuperscript{12}For a comment on a recent use of police power to take property on behalf of nature lovers, see Hide, \textit{Environmentalism vs. Property Rights}, [Autumn] \textit{POLICY} 53 (1989).

\textsuperscript{13}See \textit{e.g.}, Otago Daily Times, 6 December 1988, at 23.
to use its coercive powers to rearrange property in favour of one interest or another. Government instead confines the use of its coercive power to protecting people’s property and leaves the rearrangement of property largely to private negotiation.\(^\text{14}\) Nature lovers are thereby encouraged to become environmental entrepreneurs. They are encouraged to organise and raise money, not to lobby government, but to pursue their interests through private negotiations.

Nature lovers would be forced in consequence to confront the opportunity cost of their actions. Government would not take property rights on their behalf, and they would need to buy or otherwise negotiate for them. Nature lovers would thus come to know directly the value placed on land for other uses. Likewise farmers would come to know the value others place on their land for conservation and recreational uses. Moreover, areas of land valued for nature conservation and recreation would not be liabilities for farmers but assets and no doubt treated as such. The willingness of people to volunteer money for conservation and recreation would also indicate the relative value placed upon land for these uses.

The greatest benefit, however, would be that the clash of interests would be resolved harmoniously. Environmental activists would not be able to pursue their interests at the expense of farmers. Forced transactions would be replaced by voluntary transactions in which both parties trade to their mutual advantage. No doubt also, with each party confronting the costs of their actions, much interest would be generated in innovative ways of reducing both the costs of agriculture and the costs of

\(^{14}\)Government by definition does have the power to force property transactions, as, for example, the raising of revenue through taxation. For an excellent discussion of the proper limits to this power, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).
conservation and recreation. Environmental entrepreneurs would play a key part in better co-ordinating the plans of all those who use the High Country, and thus in achieving true multiple use.\textsuperscript{15}

\textit{Land legislation politicises land use}

The main obstruction to having High Country use decided privately rather than politically is the belief that High Country land is somehow public land. For example, the Public Lands Coalition include pastoral leases with other Crown lands, and have as their primary goal "To retain all lands of important conservation and recreation value in Crown ownership with public control through central Government."\textsuperscript{16} Pastoral lease land is not public land, however, and it might more properly be described as private land in which the landholder's rights are attenuated and made subject to political interference.

Pastoral lease land is private in the sense that lessees have exclusive rights to pasturage, they can refuse the general public access, and they have a perpetual right of renewal.\textsuperscript{17} Pastoral lease land is political in that government may impose stock limitations, and uses other than pastoralism require government permission.\textsuperscript{18}

The original reason why pastoral lease land was not alienated was that a set price was administered for freehold land at the time of European occupation.\textsuperscript{19} The price set for the High Country proved above the market price, and the colonial administrators, not wanting to freehold at

\textsuperscript{15}Cf. ISRAEL M. KIRZNER, COMPETITION \& ENTREPRENEURSHIP (1973).


\textsuperscript{17}\textit{Land Act 1948} s. 66(2). A lessee by definition has the right of exclusive possession, see HINDE, McMORLAND \& SIM, INTRODUCTION TO LAND LAW 229-31 (2d ed. 1986).

\textsuperscript{18}\textit{Land Act 1948} ss. 66A, 66(3), 99-105, 106, 108.

\textsuperscript{19}W.R. JOURDAIN, LAND LEGISLATION AND SETTLEMENT IN NEW ZEALAND 17-20 (1925).
a “low” price, nor wanting to forgo the benefits of extensive pastoralism, established a system of pastoral licences. This was a mistake. They should have freeholded the land at whatever price the market offered.

Pastoral licences were of short duration and included no right of renewal, thereby creating the incentive “to get in while the going was good.” Beginning in the 1850s, stocking reached a peak about 1880, and subsequently declined. The decline over the next 70 years has been inferred for part of the High Country as in the order of 90%. Although private landowners might have exploited the resource just as hard as licensees, they would at least have had every incentive to undertake rehabilitation as soon as technology and economic conditions made it worthwhile to do so. As it was, insecure tenure meant there was little incentive to husband the resource.

The Land Act 1948 specifically excluded from freeholding that High Country land considered by government and its advisors to be especially prone to erosion, and provided for that land the present pastoral leasehold system. The move from licence to perpetually renewable lease served to provide secure tenure. The land was excluded from the extensive freeholding provisions of the Act because being considered prone to erosion it was deemed to need government oversight. The thinking in New Zealand has always been that sound resource

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22 Royal Commission on Land Settlement, Land Tenure, and Other Matters Affecting the Crown Lands of the Colony, Minutes of Evidence, II, C-4 A.J.H.R (1905). See, for example, submissions by B.E.H. Tripp at 42; G.I. Hamilton at 437; W.F. Hamilton at 438; G. Murray at 479; H.D. Acland at 508; D. Murchison at 511-12. See also the petition presented by B.E.H. Tripp at 1594.
23 For the distinction between a licence and a lease, see Hinde, McMorland & Sim, supra note 17, at 231.
management requires government control and taxpayers' money.

The Land Act 1948 provides for regulations and restrictions and thereby enables politicians and bureaucrats to control the High Country at the expense of the “man on the spot.” Farming enterprises must in consequence be less efficient than they otherwise would be. The Land Act also renders uses other than pastoralism subject to government consent procedures and thus precludes the spontaneous development of multiple and alternative uses of land by entrepreneurs responding to public demand. The worst aspect of the Land Act, however, is that it politicises High Country land use and encourages organised coalitions to lobby government for policy and legislative changes that further their interests, i.e. it encourages nature lovers and outdoor enthusiasts to become environmental activists rather than environmental entrepreneurs.

The Great Leap Backward
Partly as a consequence of the resulting political demand for nature conservation and recreational use, and partly as a result of departmental restructuring, government is now planning a new Land Act.25 The intention is not to provide for conservation and recreation through entrepreneurial activity but rather through bureaucratic planning directed by new and expanded multiple use objectives.26 The new Bill is to require bureaucrats to take into account the natural, historical, cultural, recreation, and commercial values of the High Country,27 and the productive use of the land and the lessee’s rights are to be balanced against the need for environmental protection in the interests of the

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25 Address to the North Canterbury High Country Section of Federated Farmers by Hon. Peter Tapsell, Minister of Lands, High Country Pastoral Leases and the Need for Natural Historic and Environmental Protection 2 (Mt White Station, 29 March 1989).
26 Id. at 5.
27 Id.
wider public.\textsuperscript{28} Control of the High Country is thus to shift further away from the "man on the spot," and there is to be provision for stock limitations on individual sections of land.\textsuperscript{29} Government has attempted to assure High Country people by telling them that it recognises its responsibilities to protect fairly the rights of lessees, and that it will not unnecessarily limit the commercial production of the land nor substantially reduce the rights of lessees.\textsuperscript{30}

Government has also proposed a land categorisation exercise splitting pastoral leasehold land into farmland, restricted use land, and conservation land.\textsuperscript{31} Farmland will be that land considered suitable for commercial productive use, and may become subject to a normal renewable lease with the right to freehold. Restricted use land will be that land considered to have significant natural or recreational or historic features and deemed to require public ownership but on which productive or other commercial uses on appropriate terms and conditions are considered compatible with the protection of those features. Conservation land will be that land considered to have no commercial farming value, or which is considered to require retiring from productive use in order to protect it from erosion or in order to protect predominant natural or historic features. This land will be transferred to the Department of Conservation. High Country people have been assured that results of the categorisation exercise will not be implemented without the agreement of the lessee.\textsuperscript{32} Presumably, the plan is to use taxpayers' money to buy High Country land in the interest of nature conservation and recreation.

\textsuperscript{28}Id. at 4.
\textsuperscript{29}Id. at 6.
\textsuperscript{30}Id. at 3-4.
\textsuperscript{31}Id. at 6-7.
\textsuperscript{32}Id.
The new Bill is also to provide for the granting of special use permits for activities not otherwise allowable on pastoral lease land.\textsuperscript{33} The consent granting process is to incorporate a process of public consultation similar to the \textit{Conservation Act}.\textsuperscript{34}

Government's intention with the new Bill is to provide better for conservation.\textsuperscript{35} It is appropriate, therefore, to consider whether what is proposed will indeed achieve what it intends. The interests of conservation are certainly not served by government's move to qualify lessees' rights. Lessees' rights are now only to be fairly protected; they are to be reduced, although not substantially, whatever that may mean. Moreover, the \textit{rights} of lessees are to be balanced against the \textit{interests} of the wider public. Everything that nature lovers and outdoor enthusiasts value is now in consequence a liability for lessees. Whereas the present Act removes any incentive for lessees to provide for nature conservation and recreation, what is now proposed actually encourages lessees to destroy or otherwise diminish that which nature lovers and outdoor enthusiasts value. A lessee is not going to view native habitat as an asset but as a liability that could constrain farming operations. Any move that threatens people's property is a backward step and is counterproductive to the interests of conservation.

The Bill is also a backward step in that the High Country is to be artificially split into commercial and non-commercial uses. Categorisation and consent procedures are to be the political and bureaucratic processes that will decide the balance. The categorisation exercise for its part will prove a costly extension to the Protected Natural Areas Programme. In addition to natural values, regard will be had to historical, cultural,
recreational, and commercial values. The exercise will prove of no more use to High Country planning than the PNA programme. Reports prepared to assess High Country ‘values’ and recommend land use will merely reflect their expert authors’ idiosyncratic preferences, and the final carve-up itself will be decided by political clout. Nature conservation will thus depend upon the relative political power of commercial and non-commercial interests. A political contest that pits nature lovers and outdoor enthusiasts against farmers will do nothing to advance the interests of conservation. Such a contest will require nature lovers and outdoor enthusiasts to expend resources, not on conservation, but on lobbying government. Government for its part will have to devote considerable resources to categorising, administering, and managing the High Country. The money to be spent on the unnecessary bureaucracy that the proposed Bill will entail would no doubt be much better left in taxpayers’ pockets to be spent on conservation projects of people’s own choosing and under their direct control.

The split between commercial and non-commercial uses also means that any chance of truly integrating conservation and development will be lost. The many slight adjustments to management that would provide true multiple use are only possible through private negotiations that force interested parties to have regard to the costs that their actions impose on others. Rather than land use being decided by countless fine adjustments in this way, the new Bill is to opt for bureaucratic prescription. Nature conservation, moreover, will be entirely dependent upon government command and taxpayers’ money. Nature conservation will be something the government does and not something that private citizens need have regard to. Although the new Bill offers the prospect that environmental lobby groups will gain considerable power over the High Country, this does not equate to providing for resource conservation. Indeed, what is
proposed will not advance the interest of resource conservation at all; it is in fact a backward step.

Depoliticising the High Country

It would be much better for conservation if the High Country were in freehold. This could be largely accomplished by selling all existing pastoral lease land to lessees at a price commensurate to present rentals. The price could be calculated by adjusting for inflation the annual rental paid on a lease for the past five years, calculating the average rental, and then capitalising the average using a discount rate of, say, 10%.\textsuperscript{36} For example, the inflation adjusted annual average rental for a lease taken over the past five years might be $1000, which, capitalised at 10%, provides a freeholding price of $10,000.

Such a price is not absurdly low, as might at first be thought. The value of pastoral lease land has been all but capitalised into the lease. Anyone buying a pastoral lease has in effect been buying freehold rights, and the prices paid have reflected this fact. The lessees' situation is no different to some homeowners in Christchurch whose sections are held in 999 year leases for an annual rental of $1. The price paid for these sections is exactly that which would be paid if they were in fee simple. The rental the homeowners pay cannot be reasoned to be absurdly low and it would be ridiculous to pay much above $10 to convert the title from leasehold to fee simple. The same reasoning applies to pastoral leases. Lessees would simply be freeholding their land by paying government their future rental by way of a lump sum. In so doing they would also be safeguarding their property from political and bureaucratic interference, and for this lessees should not have to pay.

The advantage of freeholding lies in the improved resource allocation and management that would result. Freeholding cannot be treated as a revenue generating device by government because major strands of the bundle of rights that comprise freehold title are already held by lessees.

Freeholding conservation land will prove a more difficult task. Ideally the land at present owned by the Crown and managed by the Department of Conservation should be converted to freehold title and divided up amongst private groups such as the Federated Mountain Clubs, the Royal Forest and Bird Society, the New Zealand Deerstalkers' Association, and the Acclimatisation Societies. The land should be turned over to these groups for free. Nature lovers and outdoor enthusiasts would then have direct control of conservation land. Those they charge with resource management would be directly accountable to the membership because the membership would be paying their salaries. Environmental pressure groups would thus be transformed into resource management agencies. They would be able to care for the land as they best see fit, subject, of course, to respecting the rights of their neighbours. They could buy and sell land to further their interests, and, more particularly, they could sell land over which they retain an easement to ensure the protection of that which they value, and they could likewise negotiate easements over private land owned by others. True multiple use would thus be made possible. Moreover, nature lovers and outdoor enthusiasts would have authority to decide the management of High Country land and would be responsible for their decisions as the costs of their actions would fall on them and not on other land owners or taxpayers.

However, freeholding conservation land could prove difficult because under present arrangements environmental organisations have had very
little resource management experience. It would perhaps be best if they were initially supported with staff and funds from the Department of Conservation. It would be important, however, to have a plan for the eventual complete removal of government and taxpayers’ funds from the management of the South Island High Country.

**Conclusion**

Much has been made over the years of the public interest in pastoral lease land. Agricultural production and soil conservation were once in the public interest. Government was then prepared to assist farmers. Circumstances have changed. Nature conservation is now in the public interest. Government is now prepared to assist nature lovers and outdoor enthusiasts. It is about time we realised that the use of government’s coercive powers to further special interests is always inimical to the public interest. The public interest is only served when government confines the use of its coercive powers to protecting people’s property.37

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