

# **Legal roads through public conservation lands Common Issues Report**

## **Background**

The three CMS contained the following text on legal roads:

### **1. Canterbury CMS**

Policies 2.5.17 (Southern Conservation Parks Place), 2.6.27 (Northern High-Country Place), and 2.7.7 (High-Country Basins Place) state, with the text in [ ] below recording the two policy text versions:

**In respect to legal roads, work with Land Information New Zealand, district councils, other agencies and the public to:**

- a) Stop or resume legal roads running through [conservation parks/public conservation lands] and add the stopped or resumed road lands to the [parks/lands], or**
- b) seek that councils actively manage the roads and facilitate recreation on them in a way that is compatible with or recognises adjoining [park/public conservation land] management, or**
- c) seek that DOC actively provides for public vehicle and horse access on legal roads to and/or through [conservation parks/public conservation land], or**
- d) seek that the public voluntarily manage their use of legal roads through [conservation parks/public conservation lands] in a way that is compatible with or recognises adjoining park [error in CMS; should be “lands” in some cases] management.**

Policies 2.5.18, 2.6.28 and 2.7.8 **Seek the stopping or resumption of (the following) unformed legal roads**, collectively being:

- Ahuriri valley beyond the Canyon Creek formed–road end.**
- Huxley valley from Hopkins River to Broderick Pass.**
- Hopkins valley north of Elcho Hut.**
- Through the St James Conservation Area, except Tophouse Road.**
- Edging Lake Heron and Maori Lakes.**

Policy 2.6.29 proposes a review of the status of public conservation lands within the Northern High-Country Place, and while these lands do not include legal roads, submitters have commented on legal road status here as well.

Tables 5 & 6 (Southern Conservation Parks Place), 8 & 9 (Northern High-Country Place), and 10 (High-Country Basins place) have in their 2<sup>nd</sup> column heading “... **(in some cases this access may use legal road, or additional adjoining legal road access may exist, in which cases refer to Policy [2.5.17/2.6.27/2.7.7])**”. Submitters have commented on the legal road status of some of the access provisions listed in these Tables.

## 2. Otago CMS

Policy 3.1.14 is the same as Canterbury Policy 2.6.27 above.

Policy 2.1.6 is **Seek the stopping or resumption of the unformed legal road in the Pyke valley remote visitor management setting in the Mount Aspiring National Park.**

Policies 2.2.9, 2.4.8, 2.5.4 and 2.7.7 are, or include, **Consider the management options for unformed legal roads as in Policy 3.1.14 in Part Three.**

Table 2 has the reference to legal roads and the legal roads Policy 3.1.14.

## 3. Southland Murihiku CMS

The Southland Murihiku CMS has no policies regarding legal roads.

### Outline of issues raised in submissions

1. The CMS is a step forward in clarifying and acknowledging legal road issues.
2. Noting the value of unformed legal roads for access, but where through PCL and access is freely available then they can usually be stopped.
3. There is insufficient detail and justification or no discussion regarding legal roads yet there are specific policies relating to stopping them.
4. Policies 2.5.17, 2.6.27 and 2.7.7 were thought to have an implied hierarchical order, starting with stopping a road and ending with voluntary management of use of a road. Submitters considered having the policies including all four options indicated that DOC had not developed a firm position on the issue with respect to each situation that may arise in each case, and simply meant that DOC may take a different (and most appropriate action) in each case, depending on the situation.
5. Clause b) (active management by councils) may be appropriate in some instances (e.g. Alps to Ocean Trail) but would need to be assessed by councils on a case by case basis as there may be additional costs to councils.
6. Legal roads should not be seen as problems or obstacles but as opportunities to extend access for members of the public.
7. Various submissions support having management and control of all legal roads and river beds [presumably just those through pcl&w] in DOC hands, looking at long term

connectivity and seeking a sensible access network when considering changes in the status of lands adjacent to legal roads, and being cautious about the use of voluntary constraints/management as there are those who will fail to respect this. For these reasons, submitters consider DOC should take the lead on where and how vehicles can move through pcl&w by working with LINZ and local authorities rather than voluntary management, in the interest of integrated management, and by stopping legal roads where use of these would have adverse effects on natural, historic and cultural values.

8. That some legal roads need to be preserved as archaeological sites. Our pioneers provided these to ensure legal access, not with the intention they would become formed roads. All existing and historic pack tracks and trails should be documented and preserved and maintained, keeping all paper stock tracks, roads and pack tracks intact and open to the public, including the St James walking track which used to be a horse pack track.
9. Opposing the stopping of roads. Impractical road alignments and adjoining land owner resistance are common throughout New Zealand and are not sufficient reasons to stop legal roads.
10. That any proposals to stop legal roads must be well advertised to both the general public and organised groups so all have the opportunity to make submissions. Any road stoppage suggestions should be notified in advance to stakeholders before application to district and regional authorities.
11. Support for clause d) [voluntary compliance], and clause c) with confirmed provision for horse access.
12. That if DOC seeks the integrated management of unformed legal roads with adjoining conservation lands then it may seek a licence to occupy road reserve from the local authority for this purpose.
13. Spell out clearly that the Conservation Act will be followed, i.e. that where clause c) may mean increased vehicle or horse access it is only to the extent that it is not inconsistent with conservation of the relevant natural or historic resource.
14. Concern that the Crown purchase agreement for St James Station contained a clause which required "stopping" of all unformed legal roads bisecting the Station, and that as all "stopping" is required to be processed under either the Public Works or Local Government Acts the legality of the agreement statement is questionable.
15. Questions around why the legal roads in the St James should be closed, those accessing the headwaters of the Clarence and crossing to the Boyle getting particular mention.

For these issues, submitters requested:

## 1. Canterbury CMS

- a. Re-ordering the clauses in Policies 2.5.17, 2.6.27 & 2.7.7 so that road stopping is the last-listed and last-used option in the "hierarchy".
- b. Inserting the reason "where access on legal roads is causing conflict with conservation management objectives" into Policies 2.5.17, 2.6.27 & 2.7.7.
- c. Including the NZ Walking Access Commission in the "work with" list for Policies 2.5.17, 2.6.27 & 2.7.7.
- d. Using education, signage and brochures to inform people of potential options on how to voluntarily manage their use of legal roads (clause d).
- e. Using only the provisions of the Local Government Act, not the Public Works Act, for any road stopping; i.e. the public notification process via district councils.
- f. Undertaking wide consultation before any proposals are made to stop legal roads, including registering certain groups (e.g. 4wd clubs) as stakeholders for consultations.
- g. Retaining the overall legal road policy, including its road stopping option, with some acceptance for a balance between open and 'closed' legal roads.
- h. Deleting the road stopping option (clause a).

## 1. Otago CMS

- a. Both strong support and opposition to Policy 2.1.6; the support mostly around protecting the MANP/Pyke valley natural setting, the opposition mostly around wanting to allow for a proposed Haast-Hollyford formed road and the vehicle access and consequent foot access that would provide to the area.
- b. Very similar issues as listed for Canterbury above.
- c. That DOC needs to comply with the law in respect of gates and other obstructions.

## 2. Southland Murihiku CMS

- a. That the CMS should have a policy consistent with Otago's Policy 3.1.4.
- b. Noting the value of unformed legal roads for access, but where through PCL and access is freely available then they can usually be stopped.
- c. As for issues 6 and 10 above for Canterbury.

## Discussion and response to submissions

### 1. General

This 'legal roads' case is primarily about unformed legal roads ('paper roads'), but can also include formed legal roads where the formation has not been by a district council (e.g. a 4wd, mtb, horse-riding or walking tracks, or such as farm vehicle tracks on former pastoral lease lands).

Within the Canterbury (pgs 74, 92 & 102) and Otago (pgs 39, 62, 68 & 78) CMS there are brief explanations of the legal road situations (being all that is required within a CMS). The following provides a fuller explanation.

There are hundreds of kilometres of unformed legal roads passing through pcl&w, particularly since extensive high-country conservation lands and waters arose through Crown Pastoral Land Act tenure reviews and through Nature Heritage Fund land purchases (e.g. Birchwood/Ahuriri and St James). These unformed legal roads are not part of the adjacent pcl&w.

The original purpose of these unformed roads was varied, for example: giving legal access to separate parcels of land, ensuring public access through freehold or pastoral lease lands, following significant trans-alpine (e.g. Harper & Browning Passes) or droving routes, providing public access to rivers and lakes, and providing for stock access between valley-floor and above-bush line potential grazing country.

Extensive research and advice on the legislation, management and public use rights for unformed legal roads has been undertaken and provided by the New Zealand Walking Access Commission<sup>18</sup>. People unfamiliar with the detail on legal roads would be well advised to read these NZWAC guidelines. A new objective will be added to section 1.5.3 in each CMS to recognise the statutory role of the NZWAC in regard to public access.

Most pre-metric legal roads in New Zealand are one chain (20.12 metres) wide, many in backcountry situations defined only by lower-accuracy surveys and marked-up on late 1800s survey plans. Many are not ground-marked (pegged) or right-lined (i.e. straight-line boundaries between pegs) and follow what may have been a best-practicable route for at least walking, horses and stock droving at the time of survey.

In most urban and rural situations legal roads are often either double- or single-boundary fenced or are otherwise definable by cultural features (e.g. the lack of buildings), and can usually be located and followed to within a few metres of accuracy. In backcountry situations there are seldom fenced road boundaries or other cultural features to define where unformed legal roads pass through pcl&w, and the large scale of the landscape is often such that locating and following a 20 metre wide legal road is difficult.

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<sup>18</sup> See for example *Guidelines for the Management of Unformed Legal Roads*, 2011, NZWAC, Wellington.

The uncertain definition of legal roads through public conservation lands and waters is a challenge for DOC. It is not well understood by many landowners and the public, that to prevent public activities straying from legal roads onto their adjoining lands and to prove trespass, the responsibility may lie with the landowner to define their land boundaries adjoining legal roads. It may not be the responsibility of a legal road user to have absolute certainty of the legal road boundary. The limited case law and anecdotal information, in part from attempted trespass and prosecution cases that didn't get to court, supports that if a road user uses their best endeavours to keep to the legal road but unintentionally strays onto adjacent land then an attempted enforcement action against them is unlikely to succeed. A legal road user's 'best endeavours' may involve reasonably accurate GPS if the road is accurately defined, but could simply involve interpreting 1:50,000 scale mapping with an order of inaccuracy of +/- 100 metres.

The practical effect for DOC of this boundary uncertainty is that, without a site-specific cadastral survey (accuracy +/- cm), DOC could not be certain enough on the location of the actual road/land boundary to enforce the need for a concession, or to control most activities (e.g. "offences") in accordance with the Conservation, National Parks, Reserves and Wildlife Acts, within an approximate 200 metre-wide corridor along legal roads.

It is also arguable that the presence of a non-right-lined (i.e. no boundary markers) unformed legal road in a backcountry situation (e.g. a wide high-country valley, with the road defined once by a 1800s lower-order survey) is more the indicator of a right of public access up that valley, rather than providing just a 20 metre wide legal access strip. The situation can be further complicated for partially-formed roads, where public expenditure has helped form a vehicle 'road' that only approximately follows the legal road, or doesn't follow one at all; public use of this formed road even if off the legal road could be difficult to challenge by the adjoining landowner alleging trespass.

The processing of concessions in accordance with Part 3B Conservation Act 1987 involves an assessment under section 17U of "The effects of the activity" and of "Any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity." Assessing effects and undertaking measures may be difficult where an activity seeking approval by DOC for pcl&w could also occur on immediately adjacent legal road without any control being exercisable by DOC (and often with little or no control by local authorities). This difficulty is exacerbated where there is uncertain knowledge of the legal road/pcl&w boundaries. DOC cannot authorise concession activities on land not being pcl&w. Having a CMS legal roads policy at least provides assurance that DOC has considered and is seeking to address the legal road/pcl&w cross-boundary issues.

DOC is charged under section 17D(1) Conservation Act 1987 with (inter alia) achieving "the integrated management of natural and historic resources". It is difficult to achieve this "integrated management" across pcl&w which is dissected by unformed legal roads without, at least, having a CMS policy that sets out means of seeking or achieving integrated management across both pcl&w and the legal roads.

DOC currently manages these legal road situations through pcl&w in various ways:

- a) By assuming responsibility for, and funding and maintaining, a road or track formation on the legal road, with or without a formal management arrangement with the responsible local authority.
- b) By seeking or supporting the responsible local authority's own active management of activities on the legal road (e.g. Dunedin City & Central Otago District Councils' winter 4wd restrictions on the Old Dunstan Road).
- c) By seeking voluntary public compliance with activity/location restrictions (e.g. the current St James Conservation Area approach).
- d) By seeking to stop/resume the roads and having the road land added to the adjoining pcl&w, thus allowing integrated management across the entire resulting area.
- e) By not indicating or by ignoring a legal road's presence through pcl&w, by using fences or locked gates across legal roads, or by locating 'allowable' vehicle access and gate entrances away from the legal roads through pcl&w.

Of these ways, a) to d) are useful and valid approaches that DOC is likely to continue using. The methods under e) however are most likely contrary to the purposes and/or principles of the Local Government Act. They are not methods that are permissible to provide for or ignore within a statutory document like a CMS.

Within the 'strategic' scope of a CMS it is not desirable, nor practicably feasible given the number of legal roads running through pcl&w, to provide the detail on which of the options a) to d) would be used in each circumstance. Where the clause a) road stopping option is desired however, within the 10-year period of the CMS then this is specifically set out in Canterbury Policies 2.5.18, 2.6.28 and 2.7.8, and Otago's 2.1.6.

With respect to the clause c) option, where DOC currently manages activities on legal road by agreement with Council, this is indicated in the vehicle and horse access Tables 5, 6, 8, 9 & 10 for Canterbury and Table 2 for Otago. Therefore the submissions (see Canterbury issue 1(m) above) requesting that the Conservation Act provisions apply to these legal roads cannot occur, as the legal roads are not pcl&w. The 2<sup>nd</sup> column heading wording in these tables will be retained to clarify this. Further information will be added to these tables (see individual responses to the 4wd and horse-riding submissions) to identify any additional areas where DOC is maintaining access provisions on legal roads through pcl&w.

Options such as DOC seeking a licence to occupy road reserve (see Canterbury issue 1(l) above) are not possible under Local Government legislation for the many separate sections and long lengths of legal road which pass through pcl&w.

Since legal roads were first provided for in New Zealand legislation, there have also been statutory provisions enacted to enable their stopping. Current guidance is set out in the *Standard for stopping or resumption of road* (LINZS15002, 22 August 2012, Land Information

New Zealand – see [www.lincoln.govt.nz](http://www.lincoln.govt.nz)). Road stopping processes exist under the Local Government Act 1974 and the Public Works Act 1981; the former is a public and appealable process via local authorities, the latter a non-public Minister of Lands process which can still involve public consultation.

In the case of national parks, the stopping of unformed legal roads passing through them has been Government policy since the *National Parks Authority General Policy* (1978) and now in the *General Policy for National Parks* (2005 (Policy 8.1(i))). Under this policy, some legal roads through national parks have been stopped using either Public Works or Local Government legislation. Both the *Aoraki/Mount Cook* and *Arthur's Pass National Park Management Plans* (2004 & 2007 respectively) have legal road stopping policies, with specific proposals.

Iwi settlement legislation also has involved stopping legal roads to achieve integrated management of iwi historic sites, e.g. to create Wairewa Historic Reserve, within the Ngāi Tahu Claims settlement Act 1998.

The Te Waihora Joint Management plan (2005), a statutory plan resulting from the Ngāi Tahu Claims Settlement Act 1998, also contains a road stopping policy (4.1l).

On pcl&w outside of national parks and Te Waihora, there has been to-date no Departmental statutory policy with regard to legal roads. However neither has there been the extensive, legal road-crossed pcl&w that has arisen through tenure review and NHF purchases; hence the draft CMS policies and the inclusion of a road-stopping option (even if it is rarely used).

There is some submitter concern that the loss of legal roads through pcl&w could mean that if the pcl&w is disposed of in the future, then the original public access provided by the former legal road will be lost. However, pcl&w has a statutory requirement on public access (and an emphasis on its non-disposal, other than stewardship areas under section 16A Conservation Act). Even for stewardship areas the land disposal policies within the Conservation General Policy (2005) are protective of public access provisions.

In response to the points raised by submitters on the management and disposal of legal roads, a number of revisions have been made to the format and wording of Policies 2.5.17, 2.6.27. & 2.7.7 (Canterbury), 3.1.14 (Otago), and adding an additional policy in Southland Murihiku Part 3. These changes include a reordering of clauses a) to d) to reflect more closely their likely frequency of use by DOC; recognition of the statutory function of the NZWAC; the inclusion of a reason within the policy to provide useful criteria for implementation; grammatical corrections; and the addition of a provision regarding stewardship areas under the Conservation Act to provide greater protection against any hasty road stopping action that may see a loss of public access should a stewardship area be disposed of (see revised text on page 11).

## 2. Legal roads as archaeological or historic sites



Legal roads, as historical or current land tenure, will always remain recorded and be able to be located as a matter of public record through the LINZ cadastral records (even if the legal road has been stopped). Any archaeological sites on legal roads (e.g. formed pack tracks, the Browning Pass/Noti Raureka road) will remain protected under the Heritage New Zealand Pouhere Taonga Act 2014 if they are pre-1990 features, and will additionally be managed as historic sites under DOC policy if the legal road is stopped and added to pcl&w. No revision has been made to the text or provisions on this matter.

To view a legal road just because of its land tenure as an archaeological or historic site, is questionable, given the definitions given to archaeological/historic sites in the Heritage New Zealand Pouhere Taonga Act.

### 3. Specific road stopping/resumption proposals:

#### a. Canterbury Policy 2.5.18 re the Ahuriri, Huxley & Hopkins valleys.

Canterbury has about 25 main river valleys extending into the high-country. Of these, about half have substantial main-river valley-floor areas within pcl&w, and nearly all have vehicle access provisions (either formed roads or as set out in the CMS tables, using either or both legal road and pcl&w) to allow access to at least the first DOC or club/public hut in the valley. In having pcl&w provide for a range of recreational opportunities, DOC seeks to have some valleys accessible by motorised vehicles while having others free of motorised vehicles. This applies to aircraft landings, 4wd vehicles and other motorised vehicles.

The Ahuriri, Huxley and Hopkins valleys are comprised of a mix of pcl&w, Crown riverbed, legal road and pastoral lease lands. Public huts are at intervals up the valleys, and vehicle access is provided to the lower huts. DOC is seeking to keep the upper huts and upper valleys free of vehicles, in conjunction with Crown riverbed action (see Policy 2.5.15) and tenure review outcomes.

While the Ahuriri listing in the CMS for road stopping/resumption action is justifiable, the listing of both the Huxley and Hopkins may be too soon, given that there is still considerable non-pcl&w in these valleys. The policy is retained as is, but only for the Ahuriri valley. The statutory process used for any road stopping will be that under section 323 of the Local Government Act 1974, with public consultation before entering the formal statutory process.

#### b. Canterbury Policy 2.6.28 re St James.

The purchase in 2008 of the St James pastoral lease and freehold lands by the NHF, involved Government approval. This included approval for the transfer to DOC as pcl&w of the Crown river- and lake-beds within the purchase area. The agreement also included a condition stating "The purchaser warrants to use its best endeavours to resume/stop all paper roads on the property and to take all steps necessary to achieve this following the signing of this agreement."

This 'all lands' approach is not unusual; it was for example previously used with the Waitutu lands addition to the Fiordland National Park, in both cases to achieve integrated management of the whole lands. The Government approval proposes that the Local Government Act processes will be used to undertake the "best endeavours" to stop the legal roads. This action has yet to be initiated.

Public consultation with interested parties will be undertaken before any proposed road stopping action is commenced under s323 LGA. In particular, draw to public attention DOC's responses to CMS submissions by horse-rider and 4wd users of the St James area. Also an addition will be made to Canterbury Policies 2.5.17, 2.6.27 & 2.7.7 regarding any road stopping being an integral part of a wider review of the pcl&w land status within the Northern High-Country Place, as per Policy 2.6.29 in the Draft CMS (see revisions to page 11).

c. Canterbury Policy 2.7.8 re Lake Heron and Maori Lakes.

Lake Heron and Maori Lakes are nature reserves ringed by a wetland and other riparian vegetation margins. The southern shore of Lake Heron and the eastern of the two Maori Lakes are edged with legal roads, with marginal strips edging the remaining shores. The adjoining lands to the southern shore of Lake Heron are part of Hakatere Conservation Park. Active wetland management is underway on these shores, including providing for some vehicle access away from the lake shores. A protective land status to protect the natural values here for the whole of the riparian margins is desirable. This policy will be retained as is.

d. Otago Policy 2.1.6 re Pyke valley

The Pyke valley unformed legal road passes through Remote and Wilderness visitor management zones in Mount Aspiring and Fiordland National Parks, zones that would need considerable alteration (including a reassessment of the gazetted Olivine Wilderness Area) towards front-country and backcountry, should the unformed road later become formed. Such alteration would result in a substantial loss of the remote and wilderness settings and experience within New Zealand. Section 55(2) National Parks Act 1980 prevents the formation of new roads on national park land except with the consent of the Minister (except as may be provided for in the relevant management plan).

Both National Park Management Plans seek to not authorise new roads except within front-country visitor settings within the parks. Due to the terrain and road construction logistics, it is unrealistic to believe that any proposed future road in the Pyke River valley could be constructed and maintained within the existing, or any, 20 metre-wide legal road alignment. Concessions would be required for road construction and an Act of Parliament needed (refer section 11 NPA80) to exclude land from the parks for legal road. However, as noted above, since 1978 it has been Government policy to seek the stopping of unformed legal roads through national parks. Any future road will be subject to Conservation, National

Parks and Resource Management Acts processes; CMS Policy 2.1.6 sets out the current Department position.

#### 4. The structure of the general legal road policies

The ordering of clauses a) to d) was not intended to be hierarchical; in fact the reverse order indicates the most likely frequency of use by DOC. The New Zealand Walking Access Commission, given its statutory functions, should be included in the “work with” listing. The inclusion of a reason, e.g. “where access on legal roads is causing conflict with conservation management objectives”, is not essential within a policy, especially when the policy is implementing part of the Place Outcomes, but could provide useful criteria for policy implementation. Revising clause b) (as reordered below) makes better grammatical sense and gives consistency of wording with clause c. Adding a provision regarding stewardship areas under the Conservation Act, in clause d), would provide greater protection against any hasty road stopping action that may see a loss of public access should a stewardship area be disposed of.

#### Revisions

1. In all three CMS add a new objective to section 1.5.3 More people participate in recreation, to read:

“1.5.3.xx Work with the New Zealand Walking Access Commission to achieve priorities for improved access to public conservation land and waters for recreation and to enhance public access to the coastal margin and rivers.”

2. Policies 2.5.17. 2.6.27 & 2.7.7 (Canterbury), 3.1.14 (Otago), and an additional Southland Murihiku policy in Part Three, have been revised, or added, to read:

“In respect of legal roads, where actual or potential activity on or near these legal roads creates difficulties in achieving integrated management of adjoining public conservation lands and waters, work with Land Information New Zealand, New Zealand Walking Access Commission, territorial local authorities, other agencies and the public to:

- a. seek that the public voluntarily manage their use of legal roads running through public conservation lands and waters in a way that is compatible with or recognises adjoining lands and waters management; or
- b. enable the Department to manage the roads and facilitate recreation on them in a way that is compatible with or recognises adjoining public conservation lands and waters management; or
- c. seek that local authorities actively manage the roads and facilitate recreation on them in a way that is compatible with or recognises adjoining public conservation lands and waters management; or

- d. stop or resume legal roads running through public conservation lands and waters and add the stopped or resumed road lands to the public conservation lands and waters, except where the adjoining lands are stewardship areas under the Conservation Act 1987 (unless those adjoining lands are part of an action or policy to confer additional protection or preservation under section 18 Conservation Act 1987 or under the National Parks Act 1983 or the Reserves Act 1977)."