NEW ZEALAND ARCHAEOLOGICAL ASSOCIATION NEWSLETTER

LEGISLATIVE PROBLEMS IN THE PROTECTION OF NEW ZEALAND PREHISTORIC SITES.

B.G. McFadgen (Wellington).

I must make it clear at the outset that it is not possible to get complete physical protection for any New Zealand prehistoric site.

Government legislation which is relevant to the possibility of protection for our prehistoric sites falls into two groups: that which tends to support such protection, and that which negates it. The Acts which tend to support protection are firstly, the Reserves and Domains Act 1953 Part V, Sections 63 and 66, which states as follows:

Part V.

Historic Reserves

63 General Purposes of this Part - It is hereby declared that the provisions of this part of this Act shall have effect for the purpose of preserving in perpetuity as historic Reserves for the use, benefit, or enjoyment of the public such places and objects and such things as may be thereon or therein contained as are of historic, archaeological, scientific, educational, or other special national interest, being -

(a) Lands associated with the early inhabitants of New Zealand, the Maoris, early European visitors, or early European settlers:

(b) Places associated with events of national or local importance including ... buildings, trees, sites, earthworks (military or otherwise), rocks, outcrops, caves or objects of any kind:

(c) Natural objects of any kind traditionally held to be identified with the legends and mythology of the inhabitants prior to the colonisation of New Zealand by Europeans.

66 Minister may mark and protect historic places etc -

The Minister may erect suitable signs and notices on and take such steps as he considers necessary for the protection of any historic or notable place or building or tree or other object

subject, in the case of any building or place, or tree or other object that is on private land, to the consent of the owner of the land first being obtained.

In so far as these sections of the act are concerned, the term Historic automatically implies Prehistoric. (F.T. Barber, pers. comm.) The second Act in this category is the Historic Places Act 1954, sections 3,8, and 9. These sections allow, among other things, the New Zealand Historic Places Trust to:

"foster public interest in places and things .. which are of national or local historic interest, and in their marking, maintenance, and preservation thereof." and also to".. furnish assistance in relation to the .. preservation .. of historic places and things:" and also to ".. preserve or assist .. to preserve for the use, benefit or enjoyment of the public such places and things as are of such national or local historic interest that their .. preservation is in the public interest". and ..

In exercising its functions under the Act, the Trust is empowered to:

"take such steps as may be necessary or desirable to manage and preserve any places or things of national or local historic interest from time to time owned by or under control of the Trust" and to "enter into agreements with local bodies, corporations, societies, and individuals for the management, maintenance, and preservation of any places or things of national or local historic interest." and to

"acquire by lease, purchase, or otherwise any land, buildings, places, and things of national or local historic interest for the purpose of maintaining them and preserving them."

And insofar as the foregoing provisions imply prehistoric whenever historic is mentioned, then they also apply to archaeological remains. (E.J. Fairway, pers. comm.).

The Town and Country Planning Act 1953, in the 1st and 2nd Schedules includes the preservation of places of historic or archaeological interest among matters to be dealt with in Regional Planning Schemes, and preservation of places or objects of historic or scientific interest to be dealt with in District Schemes. In other words, there is a certain amount of legislation which deals with the

preservation of historic and prehistoric sites. In addition to this, under section 167 of the Land Act 1948, the Minister of Lands is empowered to set aside Crown Land as Reserve for any purpose which in his opinion is desirable in the public interest. This power is extended to Private Land under the Reserves and Domains Act 1953, section 15, and under section 439 of the Maori Affairs Act 1953: the Governor General, on the recommendation of the Maori Land Court can set aside as a reserve, any Maori Land which is among other things, of scenic or historic interest. Furthermore, under section 18 of the Reserves and Domains Act the Minister of Lands may change the purpose of a reserve, for example, he may declare a recreation reserve to be an Historic reserve.

But .. under this same section, that is section 18 of the Reserves and Domains Act, the Minister of Lands may at his discretion, revoke a reservation. In other words, section 18 negates the legislation for the protection of reserves of prehistoric interest. In the case of an historic reserve, under section 64 of the Reserves and Domains Act, the Minister may from time to time by notice in the Gazette declare that any land that is an historic reserve or part of an historic reserve shall cease to be subject to that part of the Act dealling with Historic Reserves, and shall become Public Reserve in the ordinary sense. (i.e. shall cease to be subject to part V of this Act, and thereupon the land shall be deemed to be a public reserve subject to part II of this Act.)

The Act with which the Archaeological Association is likely to have most trouble is the Public Works Act 1928. This is the Act under which land is taken for public works such as motorways, reservoirs, and hydro-schemes. Section 13 of this Act says that the power to take land for a public work'shall include the power to take or set apart the whole or any part of any public reserve or public domain or of any land vested in any local authority for any purpose whatsoever.' Section 25 provides that where Crown Land, public reserve or public domain is required for a public work, then with the consent of the Minister of Lands, the Governor General by proclamation shall set this land apart for public work.

The point which the foregoing is intended to make is that land when a reserve, is not necessarily protected for all time. In other words the status

of reserve is a temporary one, liable to be changed at any time.

Therefore it is within the framework of the rights of the Crown to change the status of reserves and to take land under the Public Works Act that the New Zealand Archaeological Association must negotiate to protect its prehistoric sites, recognising that these rights are unlikely to be changed.

It has been suggested that the existing legislation in New Zealand is insufficient to correct many current practices under which prehistoric sites are destroyed. Therefore it may pay first to look at those agencies which are responsible for this destruction and hence what protection is required, followed by the legislation insofar as it exists, for the protection against these agencies. Hence the N.Z.A.A. requires protection for prehistoric sites: (Auckland Archaeology Society, 1962).

1. Against Public Works carried out by the Crown.
2. Against Public Works carried out by local authorities.
3. Against the Crown, Local Authorities or Domain Boards altering land on existing reserves or domains on which there are archaeological remains.
4. Against destruction by private individuals i.e. fossicking.
5. Against destruction by private landowners of sites on their own land.
6. Against members of the N.Z.A.A. on certain sites.
7. Against large scale civil-engineering projects carried out by private concerns.

As examples of each factor:

The Public Works by the Crown or Local Authorities would include motorways, reservoirs, hydro-schemes, etc. on land which would usually come within the powers of the Public Works Act 1928.

Although these Public Works have often resulted in the destruction of sites, it has not always been total destruction. Allowance has been made as in the case of the Tongariro scheme, for an investigation by an archaeologist, and also in the case of the Benmore Hydro Scheme, for examination of sites to be destroyed. But the concern for archaeological remains, although very encouraging, is the exception rather than the rule.

At present under the Reserves and Domains Act 1953 a Domain Board, for example, is permitted to lay out on a domain such things as camping grounds, gardens, and to erect public halls and tea kiosks etc. Sections 49 and 45 of this Act explain more fully the powers of a Domain Board, and Section 32 sets out the powers of a body administering reserves in general, some at least of which are under Ministerial control.

The destruction of sites by private individuals, i.e. fossicking, is theoretically illegal on Crown Land and reserves, but as private land is not normally the responsibility of the Crown, the greatest threat is from this source. And similarly sites are destroyed on private land by ploughing and other farming operations, often carried out by the legitimate owner.

Protection against members of the N.Z.A.A. arises from the need to keep sites from being excavated either until better techniques are available or as a safeguard against excavations being carried out with inadequate resources, or by persons with little experience on important sites.

Finally, protection against large-scale civil-engineering is directed against the rapid urban development carried out by concerns other than public bodies.

When the existing legislation is examined, there is some protection available, although it is insufficient for the N.Z.A.A.'s requirements.

Consider first the protection required against destruction by private landowners of sites on their own land. On freehold land the only protection is by the formation of private historic reserves, provided for under Part V of the Reserves and Domains Act 1953. Although this is no guarantee against the destruction of a site by a landowner, it does lessen the likelihood considerably, as well as providing protection against private fossicking. It is unlikely that the Crown would ever make it mandatory for archaeological remains on private land to become reserves, but should a site of exceptional importance be destined for destruction by remaining on freehold land, the Minister is empowered under section 15 of the Reserves and Domains Act 1953 and also the

Public Works Act 1928 to acquire such freehold land for reserve. This power would, however, be used with considerable discretion.

As far as protection against private individuals is concerned section 84 of the Reserves and Domains Act lists the offences on reserves. These include:

84. Offences on Reserves - (1) Every person commits an offence against this Act who without being authorised .. by the Minister or the Commissioner or the administering body, as the case may require, .. (f) wilfully breaks, cuts, injures, or removes any or any part of any wood, tree, shrub, stone, mineral.. tool, or thing of any kind on any public reserve; or ..
(g) wilfully digs, cuts, or injures the sod on any public reserve: or ..
(o) In any way interferes with a public reserve or damages the scenic or historic features thereof.

Under the Land Act 1948 Crown Land is protected, although not explicitly, by section 176 which states that;

> "Every person commits an offence against this Act who, without right, title, or licence
> (a) trespasses on, or uses, or occupies lands of the Crown.
> (b) Takes or removes from lands of the Crown any bark, flax, mineral, gravel, guano, or other substance whatever.

These Acts, therefore, offer some protection against the private individual on sites situated on Crown Land or Public Reserves. Furthermore, insofar as the power exists under the Land Act to write into Crown Leases and Licences provisions protecting prehistoric remains, potential protection exists for these also.

There may be further protection tucked away in various Acts and Statutes. Two, for example, are Section 58, Land Act 1948 and the Counties Amendment Act 1961 section 29, both of which provide for strip reserves along rivers, lakes and seashores. The minimum width is one chain, except in special circumstances when ten feet is acceptable. The reserve, primarily for public access, when set aside upon subdivision under the Counties Amendment Act, falls within the provisions of the Reserves and Domains Act.

If it is Crown Land reserved from sale, it is subject to the Land Act 1948. The point is, however, how many of our sites fall completely or partially within this strip reserve?

It should be remembered however that in the case of these reserves, as with many others, the policing of them would be very difficult.

The protection against members of N.Z.A.A. is contained within the membership form and has as its basis a classification of sites. As an internal control, this seems quite satisfactory.

It is for protection against works carried out by the Government and local authorities (including Domain Boards) and civil-engineering projects that legislative changes should be recommended. For the remainder, it is not so much legislative changes that are needed, but the mobilisation of what legislation there already is in support of our cause.

It may be said that there is no effective legislation against the destruction of sites by the administering bodies of Reserves and Domains, on land under their jurisdiction. Private civil-engineering projects are perhaps the greatest agents of destruction, and also those agents against which protection cannot be ensured, especially Public Works operating within the framework of the Public Works Act 1928.

Once it is accepted that complete protection, or permanent protection of a site in its physical sense is not possible, the problem becomes not so much a problem of preserving prehistoric remains, but perserving the information contained within the site. To this end there is some relevant legislation, contained within the following Acts:

Section 67, Reserves and Domains Act 1953:

67. Excavations and Scientific Investigations - the Minister may promote, supervise, or authorise excavations and other activities by scientific organisations intended for the discovery and preservation of relics, chattels, or other things of historic interest or national importance ...

Historic Places Act 1954; Section 3. In this section, already quoted, the General Purposes of this Act include the keeping of permanent records of such places, objects, and things as are of ... archaeological interest.
Section 9. The powers of the Trust include the following;
(a) to compile and preserve suitable records of places and things of national or local historic interest.
(i) to promote or supervise excavations and other activities by organisations approved by the Trust intended for the Discovery and preservation of relics, chattels, and other things of national or local historic interest.
(k) to make grants to persons approved by the Trust to assist them to make studies or investigations approved by the Trust.

Here is the authorisation for assistance towards the recovery of historic and archaeological information, where necessary by excavation. In this respect, the New Zealand Historic Places Trust has done much to date, and the indications suggest more support from this source in future. (NZHPT 1966) It seems, then, that the legislation exists, but, the machinery needs a little oil!

There is still the problem of how best to alter existing legislation so that what legislation already exists is fully utilised, while the Public Works Act and the Crown's right to change the status of reserves is not run up against. The outline to be presented is a suggestion, but any changes recommended should state the reasons for which they are required, and how existing legislation does not cover specific instances.

First, protection is required against the authorities which administer reserves, altering land on which there are archaeological remains. This may require the amendment of section 29 of the Reserves and Domains Act where archaeological remains are concerned. This section states:
29. Licences to occupy reserves temporarily - (1) Licences to occupy any public reserves or part of any such reserve for a term not exceeding 21 years.. may be granted .. for the following purposes;
(a) to .. win and remove stone, gravel, or other similar substances;
(b) the erection of boatsheds, jetties, bathing sheds, pavilions, pumphouses, or structures of a similar nature.
(c) grazing, gardening, or other similar purposes.

Provided that in the case of any scenic reserve or historic reserve licences under paragraph (b) or (c) of this section shall be granted only in respect of open or cleared portions of the reserve.

Second, where the Crown has control over reserves and domains, all lands on which archaeological remains are known to exist be automatically declared or considered historic reserves, as provided for under Part V of the Reserves and Domains Act 1953 unless specifically declared otherwise. Where the possibility exists that some sites may be considered impressive enough to be national monuments, sections 66 and 68 of the Reserves and Domains Act 1953 may be sufficient for this end: where section 66 allows the Minister to mark and protect historic places, etc, and section 68 allows him to manage and preserve historic reserves and make them accessible to the public.

The important change to be made, however, is concerned with revokation of a reserve. Admitting the Crown's right to revoke the purpose of a reserve, historic or otherwise, or to revoke the reservation entirely, some system of notification of this change would be desirable. In this case, if it could be provided for under the Act that should an historic reserve in any way be revoked, then one to three years' notification be given to either the N.Z.A.A. or the N.Z.H.P.T., and should the intention be to modify this area physically in any way, then allowance be made for this as well, and investigation provided for under section 67 of the Reserves and Domains Act, which covers excavations and scientific investigations.

Land taken for public work may include land of any status, e.g. freehold, Crown Leases, Maori Land etc. as well as Reserves and Domains. Hence many sites not covered by the modifications suggested for the reserves and domains are sure to be affected. It is to protect the information contained in the sites that a system of salvage is necessary. For this the body responsible for the destruction of a site should be held responsible for the salvage work. i.e. the Crown or local authority. In other words, the cost of a public work would include a proportion to be set aside to ensure archaeological investigation and salvage where necessary. This may well have the effect of striking a balance between stopping a small public work where salvage costs are high in comparison with the cost or importance of the work, and allowing a large-scale public work to go ahead, where salvage costs are

small compared with the total cost, and where the loss of a site is a relatively insignificant factor. If written into the Public Works Act many public works under this authority would be affected.

It may be possible to cover private civil-engineering projects by making the optional clause for the salvage of Antiquities and Fossils at the discretion of the supervising engineer, as set out in the New Zealand Standards Specifications for Conditions of Contract for Building and Civil Engineering Construction, a compulsory one. This would well operate in much the same way as that suggested for public works, where the body responsible pays.

The detail of such legislative changes obviously requires careful consideration, with the aim of protecting the information contained within a site through provisions for the notification of the destruction of a site, as well as finance and assistance for its investigation. However, such details are for the N.Z.A.A. and the N.Z.H.P.T. to decide.

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To conclude:

Complete physical protection of any New Zealand site is not possible. Any protection other than that existing must be proposed within the framework of the right of the Crown to change the status of reserves , and to take land under the Public Works Act 1938.

Although legislative changes may be necessary, legislation exists which could be exploited further, and any proposals for new legislation should be aimed at filling the gaps in the old.

Examples of destructive agencies have been given. Some are already protected against, others require to be protected against. Where new legislation has been suggested it recognises the need to protect the information within a site rather than the physical nature of the site, hence the emphasis is on the means to obtaining sufficient notification of a site's destruction as well as the finance and assistance to salvage it.

References:-

Auckland University Archaeological Society -- Recommendations for the protection of New Zealand's Prehistoric Sites. 5th Sept. 1962.

Letter to NZAA from NZHPT, June 1966.

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SITE DESTRUCTION AND SALVAGE ON THE AUCKLAND ISTHMUS

H.J.R. Brown (Auckland Society).

As Auckland has grown so has the demand for land for housing developments, construction works and motorways. The population is now 515,000 (Yearbook: 1965). Over the last century progress has been accompanied by an acceleration in the obliteration of pre-European settlement evidence in the Isthmus. Small sites, those of transitory settlement near fishing grounds, cultivation areas and workshops, have been easily destroyed. Because of their very size the large sites are more difficult to erase, and today provide almost the only remaining examples of prehistoric settlement in the area. In 1961 57% of the area of all the hill pa remained, compared with only 4% for the other types of settlement. Five years later another 1% of the hill pa has gone to provide road metal, building material and filling for construction work: not a large amount, perhaps, but every decrease in the size and number of sites makes reconstruction of prehistoric Auckland more difficult.

More of the hill pa have survived largely because of their bulk. One of them, however, now lies under fifty miles of rail track, while another is being removed to a similar destination. Yet another has recently helped in the formation of our sewerage treatment works, and much of a larger site lies under our airport. There seem to be neither photohraphs nor sketches of some of the sites that were still standing in the 1920s. Judge Fenton, of the