Improving public access to the outdoors

A strategy for implementing Government's election policies

Public Access New Zealand

Contents

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A. Unfulfilled potential

New Zealand has had Labour-led governments, this term and last. Labour's 1999 election policies for outdoor recreation were assessed by Public Access New Zealand to be very good, with a comprehensive programme which addressed many pressing outdoor issues. What Labour offered was considerably better than any other party. It is reasonable to assume that these policies influenced the vote, and contributed to Labour's ascendancy to Government.

Throughout last parliamentary term PANZ and other NGO's pressed Government for implementation of election policies in the outdoor recreation area, in particular for improvement of the Queen's Chain. However, Labour's outdoor recreation policies remained unfulfilled apart from greatly increased funding for back country huts and tracks.

In 2002 Labour offered much of the same to the electorate. The development of a public access strategy for extension of the Queen's Chain was a key highlight of Labour's 1999 policy. This was expanded to also embrace rural and urban walkways, to ensure access to natural areas as well as waterways and coastline.

B. A way forward

In conjunction with other national NGO's last year PANZ commenced preparation of a public access strategy to demonstrate to Government that there are a number of actions that could be relatively easily taken to implement their outdoor recreation policies.

PANZ was well advanced in this when Jim Sutton, the Minister for Rural Affairs, announced the appointment of a Land Access Reference Group with the object of developing a strategy for access over private as well as public land. Mr. Sutton had previously published a wish to "clarify" the law and create one code of enforceable access everywhere irrespective of land tenure. However a quest for commonality over all land has considerable dangers for existing public rights over public lands. The public cannot expect the same rights over private land as they currently enjoy over public lands.

Codified access could result in loss of impetus for further public reserve creation, particularly in 'Queen's chain' situations, under a misguided belief that recreation needs are confined to the provision of access, with no need for public controls over the use, occupation and management of water margins. Any active outdoors' person knows that the protection and management of the settings for recreation is as important as having access to such areas. That is why public reserves are created.

PANZ has met the reference group and exchanged views with it. Based on that experience PANZ has decided to complete it's access strategy and submit it to both the reference group and to government as independent expert advice. Our impression is that the reference group could be considering oversimplified solutions to access which could threaten the integrity of existing access mechanisms.

By comparison PANZ sees no need for radical reform of access laws to achieve Government's stated aims. We do however see urgent need for action in accord with Labour's election policies for improving public access to the countryside, including to the coast, rivers and lakes. Our proposals, if implemented, would result in dramatic improvement to public access to the countryside and to public lands and waters. Such improvement would exceed any achievements of previous Governments.

The recreational electorate is looking to Government to honour its undertakings. If these remain unfulfilled, or are breached by negative changes with no electoral endorsement, we believe electoral confidence in the Labour government will be damaged.

This strategy primarily consists of an examination of the law relating to each major category of land or water, identification of inadequacies in law or practice, and recommended remedies in accordance with Labour's election policy.

C. What Labour promised in 2002

OUTDOOR RECREATION
"New Zealand's unique natural heritage offers a wide range of exciting recreational opportunities from the mountains to the sea. Labour believes that these opportunities must be accessible to New Zealanders of all ages and lifestyles. Time spent in the outdoors can enhance physical and mental health, awareness of the environment and pride in our nation. Co-existence between the natural environment and recreational activities is essential if New Zealanders and overseas visitors are to gain maximum benefit from outdoor recreation".

"Labour will:

- Protect the quality of outdoor recreational experiences for all New Zealanders, including those who are currently under-represented in outdoor recreation, such as people with disabilities or on low incomes.
- Promote outdoor recreation, and continue to improve the conservation infrastructure, including backcountry huts and tracks.
- Ensure that DOC's visitor policy is consistent with the requirement to foster the use of natural and historic resources for recreation and allow their use for tourism where this is not inconsistent with their conservation.
- Monitor and manage visitor impacts on the conservation estate.
- **Develop a public access strategy, including the extension of the Queen's Chain and the provision of rural and urban walkways, to ensure New Zealanders have ready and free access to our waterways, coastline and natural areas.**
- Ensure that New Zealand's natural recreational resources are not captured for exclusive commercial use but remain freely available for reasonable public enjoyment.
- **Protect public sports fishing and game bird hunting and, if necessary, amend the provisions of the Conservation and Wildlife Acts relating to the sale of fishing and hunting rights to close any loophole that permits the sale of access rights for these activities.**

- Encourage the completion of Te Araroa, ‘the long pathway’ from North Cape to Bluff, and encourage public and community consultation on proposed routes.
- Investigate ways of mitigating any negative impacts of tourism activities on the natural quiet and the quality of the visitor experience at key tourist sites”.

Source: Labour Conservation Policy 2002. www.labour.org (July 2002)

The strategy below (section E) focuses on the **highlighted** policies above.

D. Public expectations for outdoor recreation

Access to the outdoors is a key necessity for public recreational participation. However this is but one facet of recreational need. Protection and management of the settings for recreation is equally important so as to ensure that areas and resources remain attractive and suitable for recreational activity. There is no point in providing access to a resource if it is depleted, obstructed, or developed for incompatible purposes. Public ownership of public recreation areas has proved to provide greatest protection of the public interest through public input into management, public accountability for that management, and statutory bars to privatisation of the resource. Recreation need is much more than just ‘access’. However the pre-determinant of recreation remains ‘access’.

Obstacles to access

- **Difficulty in obtaining authoritative information.**
  Leading to intimidation through lack of empowerment, and failure to visit otherwise available areas (largest single factor in deterring public recreation).
- **Misleading sign-posting, failure to signpost.**
  The same consequence as above.
- **Obstruction of public access – a national epidemic.**
  Public roads in particular, by locked gates, private property signs, fencing across roads – deliberate diversions over private property. Roads off legal alignments.
- **Institutional disinterest,** by DOC, LINZ, Local Authorities.
  Most authorities reluctant, and many hostile to actioning public complaints over access obstruction.
- **Too much official discretion to close access, and misuse of powers.**
  Law honoured more in the breach, pandering to entrenched private interests or to suit institutional convenience, rather than upholding public purposes.
- **Trespass criminal offence brought about by changes to trespass law in 1968 and 1980.**
  “…the ordinary decent citizen who does no harm to stock or property, who wants merely to picnic by the river, to roam across the hills, or to catch fish, is not likely to be affected in any way or by any degree by this Bill”. Hon J R Hannan, Minister of Justice, on Criminal Trespass Bill. *Hansard* 1968 p 3379.
  The reality is that the Trespass Act is probably the most draconian deterrent to public access over private land anywhere in the western world.
- **OSH as a reason to exclude non-paying recreational visitors.**
  Concerted MAF education of landholders of absence of liability from natural hazards for non-client recreational visitors has had little effect on land occupier attitudes. There is only a duty to warn authorised visitors of work related, out-of-the-ordinary hazards. Natural hazards are excluded. Farmers

are not liable for warning trampers or visitors of natural hazards on their farm. However liabilities arise from use of man-made structures. If people pay to use farm land for any purpose, the relationship changes and a farmer has a duty to take "all practicable steps" to ensure that they are not harmed by any hazard arising on a farm.

- **Commercial capture of public resources and enhanced monetary value of privately owned resources.**
  The outdoors has become comodified into 'products' whether physical resources, opportunities, or events. There are strong incentives to exclude non-clients. Wealthy and foreign visitors paying high access and service charges set standard for domestic population. Now a prevailing factor in denying public access or participation.
- **Changing farming practices, more intensive land use, deer fences.**
  Areas previously available no longer so (e.g. 'lifestyle blocks', viticulture and dairying displacing sheep). Deer fences physically shutting off large tracts of countryside. Sometimes used to deliberately exclude public rather than contain stock.
- **Inflated rural land values - closer subdivision - increasing exclusivity mentality.**
  Customary access over private land now increasingly challenged by new owners with non-traditional aspirations.
- **Threats of loss of access to private lands if public assert rights of access to public lands.**
  A frequent deterrent to all but the most determined (requires certainty as to legal rights, making value judgements over what's most important, and resolve not to be intimidated).
- **Alternatives to publicly owned access insecure.**
  Lack of security for easements and covenants granting public access over private land. Liable to extinguishment without public process. Authorities likely to not enforce their terms when breached by landowners. No remedies for public. Public can be expelled not withstanding rights of access granted (Section 58 Crimes Act).

Public expectations

PANZ experience and contact with a wide spectrum of recreationists indicates the following nationally held expectations –

- Practical, convenient, and free pedestrian access TO all existing public lands and waters* unless there are express nature conservation or public emergency reasons to permanently or temporarily deny access.
- As of right unobstructed and free foot and non-motorised water craft public recreation OVER public lands and waters unless for the above reasons.
- Liberal provision for different forms of access for recreation including rights to use motorised vehicles and craft, cycles and horses conditional on land protection and nature conservation, while ensuring a range of recreational opportunities regionally (by separation of incompatible recreations through management planning).
- A right of access to hunt publicly owned fish and game resources on public lands and waters.
- Public lands and waters will be managed primarily for public rather than private or commercial benefit.
- Equality of public access, recreation and benefit for all citizens irrespective of social or economic status, ethnicity or race.
- Further provision of public lands and waters at national, regional and local level to meet growing and changing recreational needs of communities.
- All the coastline, all significant rivers, streams and lakes and their banks, be protected from private occupation and exploitation, and reserved for public recreation purposes whenever the opportunity arises.

…**with**

- Security, certainty, clear delineation of boundaries and access on ground, no necessity for prior permission or registration, no obstruction, no harassment, and citizen remedies if obstructed.
- Readily available authoritative information on public land and access provision and rights, and adequate signage.

* For the purposes of this discussion ‘public lands and waters’ are deemed to include reserves held by DoC and local government for a variety of public purposes, and Crown Lands and Forests held by LINZ, SOE's, and licensees which are available for public recreation.

E. A strategy for implementing Government's election policies

This strategy consists of **six themes** –

- **Lost Lands** (reclaiming information on the public estate)
- **Public Roads & Paths** (access for all to the countryside)
- **Queen's Chain** (extending public reserves along water margins)
- **Rivers and Lakes** (securing public ownership and public recreation)
- **Bathing at the Beach** (overturning antiquated law – securing public recreation)
- **Fishing & Hunting Access** (equal access for all)

The strategy is presented with **three action levels** –

Level 1. Application of existing law (no law changes, just action).

Level 2. Extension of existing law (building on what already exists).

Level 3. New law and significant changes.

This will allow Government to quickly assess what actions can be taken immediately, and what will require law changes with their degree of significance.

PANZ believes that much can be achieved without legislative change, and that further progress can be made with only minor amendments. It is largely unnecessary to overturn a heritage of proven statutory and common law with radical new and unproven approaches to improving public access to the outdoors. A danger is that the reverse may result.

F. Lost Lands – "Reclaiming information on the public estate"

A lack of publicly available authoritative information on the location and status of land and access, rather than the absence of recreational facilities, has created the biggest single barrier to greater participation in outdoor activities on public and Crown lands. Most members of the public will hesitate to use access routes unless they are sure they are not trespassing. The keys to assured recreation participation in any given area are confidence of rights, and certainty of availability.

Since computerisaion of the Crown cadastral database, access to land status and boundary information has become inaccessible to the vast majority of citizens, whereas digitisation should provide immense scope for greater dissemination of information. This is an area requiring urgent government attention, including–

1. Ready citizen availability of the cadastral record at non-prohibitive cost.
Progressive closure of LINZ offices will eventually mean no public counter access to the cadastral record anywhere in New Zealand. Access will only be through third party commercial or professional outlets, at market rates. The public land record has become commercialised and privatised, designed to recoup development costs through user pay charges, rather than primarily provide public access to public records.

2. Modification of *Landonline* to spatially depict all boundaries in 'Spatial View' (a means of depicting movable boundaries is covered in Section I).
Landonline is designed for professional access, with commercial charges. It is not suitable for general public use. It is cumbersome, slow, crashes frequently and requires regular use and proficiency to utilise effectively. There are serious bugs, such as obscured notations, that need fixing.

The only searching that should be necessary for the general public to determine land status and boundaries should be within 'spatial view' – the equivalent of 'record sheets' under the old paper system. It should not be necessary to view or purchase individual survey plans and certificates of title. These are prohibitively expensive and too complex a task for most citizens to attempt on *Landonline*. Most people would need to employ a search agent or a *Landonline* registered user to find individual records.

A free to public cut-down version should be provided, with all parcel boundaries, land appellations, plan references, public easements, and notations (e.g. legal road, marginal strip, Crown land, conservation area, reserve, Crown Forest, etc.) in spatial view mode. Land ownership, title, and survey records should be separately provided in the full version of *Landonline* or to be obtained via LINZ's *Skylight* via internet, fax or post. The latter is designed for general public rather than professional use, but depends on prior knowledge of legal descriptions and plan references. It is essential that LINZ also provides ready public access to these references. A cut-down version of *Landonline*, as suggested above, could do this.

3. Provision of access maps of roads and public land boundaries .
Digitalisation of both the Crown cadastral and topographic map databases provides a unique opportunity to combine information from both data sets into one user-friendly map of public access ways and public lands. A Definitive Map series of public paths in England and Wales provides the authoritative record of rights of way. This provides the basis for Ordnance Survey *Landranger* and *Pathfinder* maps combining topographic, rights of way and other public information. These popular maps provide the key to the public having confidence to utilise the huge network of public paths in the UK. The New Zealand definitive map should be Spatial View in *Landonline* in terms of recording the existence and legal status of roads. However without a topographic backdrop it is incapable of field use.

Cadastral information depicting public roads needs to be combined with topographic data, but extending to cover the boundaries of all public and Crown lands and waters. Notations recording the legal status of such lands need to be added. This would not only be of immense public benefit, but also to land management agencies whom don't necessarily know where all the land they administer is (e.g. DoC and marginal strips).

Currently LINZ is developing a *NZTopoOnline* series which ulalises either topographic or orthophotography (air photo) bases. This extends beyond representing just physical features, with classifications for roads, tracks and bridges, however this does not include land or road legal status information.

Government should actively investigate options for combining topographic and cadastral data for a *PublicAccess* map series. The forms of delivery should make the most of the electronic platform so as to be available for GPS, CD, internet, and paper reproduction at any desired scale. **The advent of personal computers, printers, and hand-held GPS has the potential to revolutionise public access to the outdoors.**

> "…the public, for whose benefit the system was designed, in many cases do not know whether a right of access exists, and powerful economic forces are at work to stop them finding out". John R Milligan. Public Access to Water, a New Zealand Mirage. June 1977. *The Landscape*.

> "Making better information available about which areas are available to the public for access could only be achieved at considerable cost to the taxpayer". Whereas: "Government policy requires that LINZ make topographical information available easily, widely and equitably (free) to the people of New Zealand". Briefing to the Incoming Minister. LINZ. 2002.

SUMMARY OF INFORMATION STRATEGY

- Ensure citizen access to the cadastral record easily, widely and freely. *Level 1*
- Provision of a free cut-down version of *Landonline* to spatially depict parcel boundaries, including movable reserves, public land notations, survey plan, appellation and title references in 'Spatial View'. *Level 1*
- Provision of topographic maps with overlayed public road, public land boundaries and status. *Level 1*

Sign posting is covered under section G.

References

LINZ. 2002. Briefing to the Incoming Minister. Policy Issues.

Milligan, John R. June 1977. Public Access to Water, a New Zealand Mirage. *The Landscape*.

Wilson J, Booth K, Curry N. 2002. Rights of access for outdoor recreation: What does the public know? *NZ Geographer* 58. No. 1 (April): 33-42

G. Public Roads & Paths – "Access for all to the countryside"

Under existing law there are a variety of mechanisms for creating public rights of way (ROW) over private land. They are often confused with or portrayed as if they are synonymous with public roads. They are not. ROW remain private lands notwithstanding any public privileges granted. This is in marked contrast to the protections and certain rights afforded by public roads which are wholly public property.

With only minor exceptions, public roads provide legal frontage to the boundaries all property, private and public. The network already exists. Roads provide Centuries old rights of unhindered passage – the leading form of 'wander at will' in New Zealand.

Popular mythology

1. **Public roads are just for vehicles.** However many roads predate motor vehicles. They are for pedestrians, horse riders, cyclists, and vehicles. All roads serve some purpose, including legal access to individual properties. Public highways (which include navigable rivers) are recognised in statute as a form of public road, along with carriageways, bridle paths and foot paths, as is every square or place intended for public use generally. Motorways (use confined to motor vehicles) are not public roads.
2. **Roads can only be created for motor vehicles.** Not so. New roads can be 'dedicated'* or created for one form of access or combination thereof. Again, roads don't automatically mean cars.
3. **'Paper roads' aren't real roads.** The colloquialism 'paper road' has no legal standing. A road is a form of highway, whatever its state. All public roads have the same legal status and public rights. Formation or fencing is not required. No one can identify 'freehold' on the ground – is this then merely 'paper freehold'?
4. **Adjoining landowners 'own', or must be consulted before using unformed roads.** However public roads are public property. They do not pass over private land – they bisect it. The freehold is vested in the roading authority (a major difference from English law). Use does not require consent from adjoining owners or local authorities. The right of passage is vested in the public.
5. **Roads need to be surveyed to be legal**. Roads do not require survey to 'legalise' them – survey often follows the opening up to public use of road realignments, as *confirmation* of amended property boundaries. 'Dedication'* is the key to legality. This involves either an express or implied intention by a landowner to "throw open" a 'public highway' and EITHER a roading authority accepting it OR the public using it.
6. **There is a legal obligation to form or maintain roads.** However dollars spent is entirely within the controlling authorities' discretion, – there is no financial liability from retaining or creating roads. Most unformed or 'green roads' need only marking to be used.
7. **Roads are just the responsibility of local government.** However roads can be vested in either central or local government. Government purpose roads or paths could be created for public access to public lands – doesn't necessarily entail vehicle roads and associated costs. That is a matter for case by case decision. Public roads are the most secure form of access devised.

New Zealand's public road network is a vast web of formed and unformed roads that ties the whole settlement of New Zealand together. With few exceptions every property, private and public, 'fronts' onto a public road, providing **assured legal access to property** and the sole means for citizen passage throughout the country. Without this network there would be no means for citizens to exercise their rights of freedom of movement or the ability to utilise private property. Therefore **public roads have immense constitutional importance.**

Public rights of unhindered passage are derived from the common law of England. Centuries of development of case law are embodied in our legal system. The New Zealand courts have refined this law to our circumstances and continue to make important rulings affecting roads and recreational use.

Despite a longevity of legal history, there is almost universal **ignorance of the law** and little or no reflection on the diverse purposes roads serve. Roads are such an integral part of our daily lives that they are taken for granted. Roads are widely assumed to be synonymous with motor vehicles – that they serve no purpose, and have no status in law or reality unless they can be driven along (giving rise to the notion of "paper roads"). Whereas most roads in New Zealand predate the advent of motor vehicles – they are "the King's Highway" for pedestrian, horse or horse-powered vehicle passage, as well for latter-day motorised contrivances.

Avarice and ignorance has resulted in **widespread abuse of roads by adjoining landowners** assuming proprietary rights and excluding others by way of illegal barriers, buildings, and misleading signage. Local authorities whom administer most roads, have generally condoned obstructive private occupation despite the law being well established. Generally there has been no resolve to ensure that roads continue to serve their public purposes. PANZ's experience is that common and statute law is breached almost as a matter of course in the daily administration of roads. Despite having all necessary powers to ensure that roads remain open and unobstructed, generally there is a lack of resolve to do so. Many councils see roads as liabilities, rather than as assets serving more than the interests of the transport and commercial sectors.

Not all roads serve, or are capable of serving purely recreational needs, however **a vast untapped resource of 'green roads' exist that could be utilised for greatly improved public recreational access**. Where roads don't exist on convenient alignments, negotiated re-alignment can be instigated, or new roads dedicated.* Dedication does not necessitate vehicle access and the creation of carriageways. The fear of ongoing maintenance costs, through an erroneous "roads mean vehicles" presumption, deters most councils from considering other options. These include dedicating new roads solely for pedestrians, or pedestrians and cycles, or pedestrians, cycles and horses. The law already allows this and precedents exist.

Other than along vehicle roads, **the English path network** provides the primary means of recreational access through the countryside. This is based on roading law, a mix of common law and statute, known as 'The Law of Highways'. Approximately 140,000 miles of path exist and more are being opened up. Many visitors to New Zealand comment that the English countryside is far more accessible than that in New Zealand, despite almost identical law and a greater network of public roads existing here. The key difference is public and institutional awareness. The law relating to public roads/paths is widely known and fiercely defended in the UK. This is because of extreme population pressure and a dearth of alternative open spaces in which to recreate. The latter deficiency is starting to be addressed through the recently enacted Countryside and Rights of Way Act. In New Zealand we have the reverse 'problem' – a generous provision of public lands and waters (greater than 30% of land area) but inadequate access to this and through the countryside generally.

There is immediate scope to greatly improve access to the countryside by **opening up strategic and well-placed public roads for recreational use**. Priority should be given to improving access to public lands, river margins, the sea coast, etc. This would entail using existing roads if suitable or realigning or dedicating new roads/paths.

Secondly, the recreational potential of unused roads that don't go to public lands or waters should be utilised. An example of what can be achieved is on the Otago Peninsula where a network of twenty unformed or green

roads linking vehicle roads have been opened up for walking, greatly extending recreational opportunities on the margin of a large urban area.

No national plan is required, just local action. However national impetus is needed to encourage action. Most roads are under local authority control. These authorities should instigate a programme entailing consultation with DoC, their own reserves and recreation departments, LINZ concerning Crown land access, adjoining landholders, and the public to identify all public roads, existing access to public lands, deficiencies, and options for improvement. New roads/re-alignments will require negotiation with affected landowners. One-off compensation for land taken should be payable, with DoC or other public landholders benefiting from the access being asked to contribute. Land acquisition can be minimized by taking only sufficient width necessary for the form of access proposed (e.g. 3m for a walking path, rather than usual 20 m for vehicle roads).

Development, sign posting and way-marking should follow. A unified national standard of marking and sign posting would greatly enhance public understanding of access rights and responsibilities. Concurrent publication of guides setting out local authority, adjoining owners' and public responsibilities and rights relating to roads is an essential step to overcome the current "universal ignorance", and to encourage compliance with the law.

All the above actions can be implemented without changes to the law. What is required is the vision and will to do so. Central government needs to create the right climate conducive to local action. It all doesn't have to happen at once. Progressive action over time will allow improved access provision according to changing local needs.

Public rights over public roads are determined by the common law. This is law that is common to all roads – it applies everywhere. This commonality should assist national education of the public of their rights as well as their obligations, leading to better observance of the law and greater respect for adjoining private property.

Alternative access mechanisms

Under existing law there are a variety of mechanisms for creating public rights of way (ROW) over private land. ROW are different entities from roads, with the underlying land ownership remaining private. They are however often confused with or portrayed as if they are synonymous with roads and their rights of passage. They are not.

Various forms of easement (Walkways, access strips and other easements) have made only limited headway in securing public access over private land. This is primarily due to the reality that very few private landowners are prepared to commit themselves and future owners to permanent access arrangements. For instance, 30 years of effort to establish **New Zealand Walkways** (a form of easement) has resulted in only 170 established nationwide. The founding object of establishing a coherent national walkway system has not been even remotely realised. Through difficulty in obtaining consent for Walkways over private land, most Walkways are over public land – where legal rights of access already existed and other legislation could have been used for establishment of tracks. While extending Walkways over private land is a laudable object, experience indicates that the likely betterment to public access that may result can only be minimal compared to what is possible by utalising an existing nation-wide network – 'green' public roads.

Most easements fail the essential public expectation of secure access. They can be modified or extinguished without public process (section 126G Property Law Act 1952). This is despite often being registered "in

perpetuity" against property titles and appearing legally secure on paper. These provide true "paper access". Most have highly variable conditions attached to entry and can be closed from time to time. There are no lawful remedies available to the public when obstructed. The public is totally dependent on the authorities to uphold their rights. However most authorities are reluctant to enforce the terms of agreements, more often ignoring breaches or amending the terms to suit the new situation. Under the Crimes Act (section 58) the public is liable to eviction notwithstanding rights under any easement. In effect these arrangements last for only as long as the current landowner's goodwill remains**. The reality is that these are private lands notwithstanding any public privileges granted.** This is in marked contrast to the protections and certain rights afforded by public roads which are wholly public property.

Since 1993 **'access strips'** have been able to be voluntarily negotiated between district councils and private land owners (section 237B Resource Management Act). Very few have resulted; the primary obstacles being lack of impetus from councils, and reluctance by private owners to commit themselves and future owners to restrictions on the use of their land.

Since 1977 Government has had express powers to acquire private land and any interest therein **"for the improvement, protection, or extension of or access to an existing reserve, or to establish a public right to wander at will on foot within specified limits in any reserve, or to provide recreational tracks in the countryside"** (section 12 Reserves Act 1977). The creation of recreation reserves under section 17 is one means to achieve the latter end. These provisions can be used either for voluntary or compulsory acquisitions. Despite the long-standing existence of these laws, PANZ is aware of them only being used once in recent years. Given their almost identical objects to those of Government's Land Access Reference Group, it is cause for wonder at what aspects of the law need to be "clarified" to achieve greater public access to the countryside. **Vision, energy, and determination appear to be the primary determinants for public access provision, rather than alleged shortcomings in the law.**

SUMMARY OF ROAD STRATEGY

- **Locate** existing roads that serve a useful recreation or access purpose and establish sign-posted, obstruction-free public paths. *Level 1*
- **Relocate** existing roads to more practical routes. Exchange old roads for new roads (local authorities use bargaining power with adjoining land owners). *Level 1*
- **Dedicate*** new roads for foot, cycle, horse, or vehicle passage as the primary public access provision to public lands and waters where existing access is absent or inadequate. *Level 1*
- **Educate** government and local authority staff about 'The Law of Highways' and their responsibilities. Concurrent public education about rights and responsibilities. *Level 1*

DETAILED ROAD STRATEGY

1. Create public path network.

When access to public lands, and to (as opposed to along) water margins (the 'Queen's Chain'), is being created, public roads are to be preferred to other forms of access such as easements and covenants over private land. Easements, etc., are insecure, and have no public remedies when obstructed. 'Dedication' of public highways for classes of user, other than for motor vehicles, has had only limited application in New Zealand, but is capable of much wider use without any necessity to change the law.

Action:

- Local authorities to instigate a programme involving consultation their own reserves and recreation departments, DoC, Fish & Game, LINZ and the public to **identify all legal roads**, existing access to public lands, deficiencies, and options for improvement. *Level 1*
- When **creating new access** to public lands and waters, preference to be given to **dedication of public foot paths, cycle paths, and bridle path**, as alternatives to vehicle roads when vehicle access is unnecessary or undesirable. *Level 1*
- Central Government actively encourage local authorities to define, signpost, and develop 'green roads' for foot, cycle, horse, or vehicle use as appropriate, using unified **national standards of marking.** *Level 1*

2. Provide public information.

Lack of public awareness of the legal nature of public roads and an accessible map record are the primary deterrents to public use.

Action:

- In conjunction with local authorities, Government initiate **an education programme** for roading authorities on 'The Law of Highways'. Concurrent public education about rights and responsibilities. *Level 1*
- **All public road alignments** (formed and unformed) be overlaid on LINZ topographical information and **made available electronically** and by publication (refer to section F). *Level 1*

3. Counter obstruction of roads.

Obstruction of many public roads, through a mix of ignorance and willful intent, is very prevalent. Despite obstructions being unlawful and road controlling authorities having enforcement powers, most fail to protect the public interest.

Action:

- Introduce a legislative equivalent to that in the UK Highways Act creating **a duty for authorities in control of roads to "assert and protect public rights of passage".** *Level 2*

  Obstruction of public roads is the largest access problem in New Zealand. PANZ deals with such cases on a daily basis, when called upon to provide advice to aggrieved members of the public. The biggest obstacle to resolution is invariably official reluctance to bat for the public interest. Despite having extensive powers to deal with illegal obstruction, most councils are very reluctant to exercise these and more than occasionally hostile to public representations. This results in the law being repeatedly flouted and the public barred, or members of the public being forced to take direct action at the risk of confrontation.
- Introduce **offence provisions for failure to signpost gates** as 'Public Road' across formed roads (an existing requirement, section 344(2) Local Government Act) that is universally ignored). *Level 2*

  Councils currently have power to authorise gates across public roads provided signs are erected and maintained stating 'Public Road'. It is however exceptional to see this requirement observed. The absence of such signs creates uncertainty in most peoples' minds as to their right of use, by implied assertion of private property. It should be an express offence not to erect and maintain such signs, with councils having a duty to either ensure compliance, or remove offending gates.

- Introduce **offence provisions for misleading signs or notices** on or near roads containing false or misleading content that is likely to deter public use. *Level 2*

The only sign posting concerning the legal status of roads should be 'public road'. The erection of sign posting stating or implying some other status should be made an offence, along with signs implying that roads are closed when they are not. Councils should have powers of removal and recovery of costs. Misleading sign posting should be deemed to be an obstruction, triggering the proposed Council duty to assert and protect the public right of passage.

4. Retain citizen rights of unhindered passage.

Continued public ownership and control of public roads is essential for continuation of common law rights of unhindered passage. The New Zealand Courts have proven that they are far more reliable upholders of these rights than politicians.

Action:

- Retain public ownership and control of public roads. *Level 1*
- **Reject any attempt to codify or define/qualify public rights of passage in statute**, due to the major risk of reduction in existing rights, and once legislated, the further weakening or revocation of these. *Level 1*

5. Amend road stopping procedures.

If the Crown so wishes, unformed roads can be disposed of without public process, despite public use rights being the same over all roads. The presumption that unformed roads serve no purpose is erroneous because many unformed roads are regularly used, particularly by pedestrians, and many are capable of use with greater awareness of their existence.

Action:

- Amend statutes to make an existing power of Crown resumption of unformed roads (section 343 Local Government Act) subject to public 'stopping' procedures. *Level 2*
- Add a requirement to the 10th Schedule of the Local Government Act to ensure retention of property frontage and practical, public access to public reserves, lakes, rivers, and the sea coast when local authorities and the Environment Court make road-stopping decisions. *Level 2*

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* **'Dedication'** is the key requirement for creation of public roads. Before there can be a dedication, there must be *"animus dedicandi.* This means a land owner's intention of setting apart as public road, followed by either official or public acceptance. The effect of dedication is that the freehold of the road is transferred to the roading authority, usually a district council. A landowner's intention may be either explicit or implicit. Acceptance by the public requires no formal act – just acceptance through use. These days an intention by a landowner to dedicate a public road is usually by express action. This usually involves statutory law, but does not require this. Many historic roads are derived from informal actions and practices covered by common law.

H. Queen's Chain – 'Extending public reserves along water margins'

The 'Queen's Chain' is a popular term referring to a variety of **public reservations** along the sea shore and the banks of rivers and lakes. It does not extend to the bed of rivers, however one effect of public ownership of the banks is that adjoining beds become publicly owned if not already. It would be rather pointless creating reserves for public access to waterways if the waterways themselves were not also available for recreation.

The historic origin of the name 'Queen's Chain' is uncertain, however it aptly reflects an admirable Victorian intent applicable to the present day. Its origin are instructions from Queen Victoria to Governor Hobson in December 1840. Hobson was required to report on particular lands it might be proper to be set apart for a variety of public purposes, including for landing places, recreation and amusement, on the sea coast or in the neighbourhood of navigable streams. Queen Victoria enjoined that "not on any account, or on any pretence whatsoever, grant, convey, or demise to any person or persons any of the lands so specified as fit to be reserved as aforesaid, nor permit or suffer any such lands to be occupied by any private person for any private purposes".

The 'Queen's Chain' is not Royal jewelry, but the normal width of the reserve, 22 yards or one chain, nowadays 20 metres. This arose because roads were usually one chain wide and officials and surveyors considered this was wide enough for public purposes. However the width can be greater, or a minimum of 3 metres. **Private land to the water's edge is not part of the 'Queen's Chain'.**

The term 'Queen's Chain' is not to be found in law but each form of reserve is authorised by statute with public rights of use arising either from statute or common law. There are formed and unformed **public roads** (covered in section G), marginal strips, esplanade reserves, and other reserves.

Marginal strips

These are special conservation areas administered by the Department of Conservation. 'Marginal strip' is a relatively new term. Such strips are mainly derived from former Crown land and, in accordance with the Royal instructions, remain "reserved from sale or other disposition". Subject to conservation purposes, the strips are for public recreational use and to enable public access to adjacent watercourses or bodies of water.

Esplanade reserves

As for marginal strips, the purposes of esplanade reserves are to enable public access to or along any sea, river, or lake; or recreational use where compatible with conservation values. The ownership and/or control of these 'local purpose' reserves is usually vested in trust in a local authority, subject to the protections of the Reserves Act. With amendment to the Resource Management Act in 1993, the purposes of esplanade reserves were confused by making these the same as for new private entities - 'esplanade strips'. This introduced the bizarre possibility of public promenades, esplanades, with no right of public entry.

Many local authorities are reluctant to accept reserve management responsibilities. For this reason relatively few esplanade reserves are now created, and this is compounded by land compensation issues.

Other reserves

Approximately one third of New Zealand's land area is publicly owned. National parks, scenic and recreation reserves, and conservation areas front onto many seashores and waterways. These are usually over large areas, much wider than one chain wide. While these remain publicly owned and available for as-of-right recreation (except 'special areas' in national parks, nature and scientific reserves) and are not liable to "disposition", they serve Queen Victoria's intended purposes. There is no need to specifically set aside a 'Queen's Chain'.

There can be other special reservations such as around Lake Taupo where there is reserved to the public a right-of-way over a strip of land not exceeding one chain in width around the margin of the lake.

Esplanade strips

Esplanade strips do not meet the essential 'Queen's Chain' requirement of being public land reserved from sale or other disposition, with assurance of public use. Therefore they are not part of the 'Queen's Chain'. In 1993 the Government introduced the option for local councils to require 'esplanade strips' rather than esplanade reserves when approving subdivisions. Esplanade strips remain in private title. They have specified and very constrained public rights of access and recreation, if at all. Esplanade strips move with changes to watercourses. Adjoining private river and stream beds remain in private ownership.

Since 1993 **compensation** has been payable for both esplanade strips and reserves involving allotments greater than 4 hectares in area. Compensation is not payable for standard 20 metre strips and reserves on smaller allotments, however for wider reserves and strips compensation is payable. There is also compensation for the taking of private foreshores, river and lake beds adjoining newly created esplanade reserves, but not strips, for allotments greater than 4 hectares. These are disincentives for creating reserves (of greater compensation value than strips), particularly on larger rural subdivisions. This is where the need for public esplanades is greatest. These compensation provisions need review.

How complete is the 'Queen's Chain'?

Not all the shores of the coast and larger lakes and the banks of navigable rivers have a 'Queen's Chain'. There is highly variable coverage depending on the local history of settlement. An approximate national average is 70 per cent coverage.

Why hasn't the 'Queen's Chain' been established everywhere?

Coverage is incomplete because there has been variable compliance by the authorities with Queen Victoria's instructions including to the present day, and variable legal requirements over time. Also the Crown can only implement when it has ownership. The first move to include private land was not until 1886.

Large tracts of New Zealand remain Maori lands, with pre Treaty of Waitangi land sales directly to private individuals. Post Treaty, all land sales were supposed to be to the Crown, hence creating opportunity to reserve a 'Queen's Chain' before disposal to private owners. However for a 30 year period the Crown's Article Two right of re-emption (to be sole purchaser of Maori land) was waived. Uncontrolled land sales by Maori to settlers made vast inroads into these lands, without opportunity for the Crown to establish waterside reserves.

When is the 'Queen's Chain' established?

Establishment of the 'Queen's Chain' involves progressive action over time. What we now have is an inheritance of 160 years of land subdivision history. The authorities remain charged with continuing this process until there are no more qualifying waterways without a 'Queen's Chain'. Active Crown effort to fill in the gaps caused by non-compliance with the right of pre-emption would be in accord with Treaty principles.

When the Crown is disposing of land, either by sale or lease, a marginal strip is required to be retained in Crown ownership. When local authorities give consent for subdivision of private land they can require the creation of esplanade reserves with ownership vesting in councils. Historically the latter were viewed as part of a "reserves contribution" from developers as compensation to the community for loss of amenity values and increased demand for services arising from subdivision.

Since June 1841 'Queen's Chain' have been reserved by a succession of ordinances, proclamations, survey instructions, regulations and statutes:

- Along the shore of the sea above the high water mark.
- Along the shores of lakes 8 hectares or more in bed area.
- Along the banks of rivers and streams an average bed width of 3 metres or more.

Does the 'Queen's Chain' move?
Since 1990, newly created marginal strips move automatically with any changes to foreshore, lake and river margins. Roads, other reserves, and earlier marginal strips remain fixed in position with many becoming isolated from current watercourses and shores. This is an obvious area for legislative reform.

Locating the 'Queen's Chain'
In any given area the status and boundaries of each category of reservation, if any, must be ascertained prior to entry. If a public reserve or road exists, intending users don't need consent from anyone. However lack of readily accessible, reliable information is the biggest single deterrent to public use of the 'Queen's Chain' (refer to sections F and I).

QUEEN'S CHAIN STRATEGY

1. Make movable
Natural water boundaries are inherently susceptible to change through natural causes. This is particularly so in New Zealand with geologically rapid erosion and many braided rivers.

The common law doctrines of accretion and erosion have mixed application to New Zealand watercourses. These doctrines give rise to recognition of movable freehold boundaries in certain circumstances. There has to be gradual and imperceptible change to a natural water boundary, by either silting up against the bordering land (alluvion) or the permanent retreat of the water (dereliction). The area of bordering freehold parcels are either enlarged or diminished as a consequence.

The doctrine of accretion is not applicable to the land on the margin of a lake, as the doctrine **applies only to the land adjacent to the sea, streams and rivers**.

Where the boundary of land along the margin of a river is in a fixed and defined line, then it appears that the doctrine of accretion does not apply. This has important consequences in New Zealand for defined 'reserves' along margins of sea, rivers and lakes. This is modified by section 315(4) Local Government Act 1974 which specifies that every accretion to roads along the margins of the sea, lakes, rivers or streams shall form part of the road, and where eroded, that portion shall continue to be road (section 315(5)).

Pre 1990 marginal strips remain fixed in position. All esplanade reserves remain fixed. All roads are fixed in position but can be added to by accretion. This means that when watercourses change, historic marginal strips don't move with the bank, and can be left high and dry or in waterways. This defeats their public access and riparian management purposes. Likewise, coastal erosion extinguishes reserves (they become sea bed). Roads remain along the new sea bed, however there are no replacements for either reserves or roads above new shorelines.

Marginal strips created since 1990 are movable. This means that both water-ward and land-ward boundaries automatically change with changes to watercourses. Movability is confined to lands of the Crown, and on all land the title to which is subject to Part IVA of the Conservation Act. It does not apply to other land.

The concept of movable freehold boundaries should be extended to all situations involving water margins. Whilst this could be portrayed as confiscatory of private property rights, this would be no more than recognition of immutable natural processes over which mankind has little or no control. Private freehold, as

well as lands of the Crown, are being extinguished now by river movement and coastal erosion, with no "compensation". Where control measures are effective, or in situations where shorelines and banks are naturally stable, there isn't a problem, although making riverside reserves *capable* of moving in all situations would cover all future eventualities. Significant changes to existing statutory law, and extension of statute to override common law presumptions would be required. Private rights to fixed chattels and assets could be protected, including the right to relocate off newly created marginal strips, reserves or roads.

An alternative existing mechanism that only applies to marginal strips is section 24E of the Conservation Act. This allows the exchange of existing marginal strips for other strips of land where this better serves their access and conservation purposes. The new strips *should* then become movable. This would allow realignment of marginal strips along rivers, streams and the seacoast. However DOC's current practice is to replace fixed strips with new fixed strips. This defeats the purpose of section 24E. The necessity and legality of this practice needs to be examined. Section 24E could have direct application to very good effect during the current programme of tenure review in the South Island high country. Rationisation of marginal strips could be made conditional on acceptance by the Crown of any proposals for freeholding of pastoral leases.

Mechanisms could be created for exchanges between reserves or roads and private land, however these would require individual negotiation. It is most unlikely this could achieve more than isolated improvements to the 'Queen's Chain' and public access. Creating a generally applicable movability mechanism is much to be preferred. Possibly more than a third of existing 'Queen's Chain' reservations are now off their intended margins with water bodies. Labour's policy of providing "ready and free access to our waterways and coastline" can only be achieved through a comprehensive measure. The commitment to "extend the Queen's chain" dictates that must be through extension and relocation of public reserves, rather than some lesser provision of some form of access easement over private land.

Action:

- Make all marginal strips, esplanade reserves, and roads movable along water margins through amendments to the Conservation, Reserves, Resource Management and Local Government Acts. *Level 3*
- Make all tenure reviews and lease renewals involving lands of the Crown conditional on exchange of any fixed marginal strips for movable strips, and the creation of new marginal strips along all qualifying waterways. *Level 2*

2. Provide public information

LINZ's current practice is to solely rely on notations on certificates of title and survey plans to show where marginal strips exist. However notations that land "is subject to Part IVA Conservation Act", etc., are so obscure as to not tell the public or even DOC if in fact a strip exists, or is merely liable to be created at some time in the future when there is a land disposition. Lack of certainty in the public record as to the existence, extent, location and width of strips is the primary deterrent to public use. No changes in law are necessary. The means of recording on plans is within the discretion of the Surveyor General. Ministerial direction may be necessary to achieve desired changes in recording practice. In contrast, the boundaries of all roads and esplanade reserves are shown on survey plans.

Action:

- Require LINZ, in addition to providing necessary notations, to graphically record the existence of marginal strips on all relevant survey plans and in 'spatial view' of *Landonline* (refer to section I for detail of implementation). *Level 1*

3. Extend coverage

Not all the shores of the coast and larger lakes and the banks of navigable rivers have a 'Queen's Chain'. An approximate national average is 70 per cent coverage. To implement the Labour policy to "extend the Queen's Chain" requires an intent to fill in the gaps.

Continued establishment through progressive action is required (i.e. at subdivision, reclamation, and Crown disposition) until all qualifying waterways and shores are in public ownership and reserved for public purposes, except areas expressly excluded (e.g ports, hydro generation plant).

Although it may take many decades to achieve total coverage, this process, in conjunction with making all existing reservations movable, would result in the vast majority of water margins being protected and available for public use. Readily available public information on reserve location would make the 70 and growing per cent capable of public use – something that is impossible now. No radical reforms, such as creating a general right to wander along all water margins, are required. The latter approach would be likely to jeopardize the inherent strengths of existing public rights.

Action:

- Amend existing criteria for establishing marginal strips and esplanade reserves:
  - Along all the sea shore and tidal estuaries (no change). *Level 1*
  - Along shores of lakes 8 ha or greater in area (amendment: for private lands, 2 ha or greater on lands of the Crown). *Level 2*
  - Along banks of rivers and streams if width of beds 3m or more (change from average width). *Level 2*

    Explanation: This new minimum would need to be applied to take into account variable bed widths. Generally rivers and streams narrow closer to their source, however constrictions occur, with wider beds upstream. We recommend that future requirements for establishing esplanade reserves and marginal strips be confined to along the banks of watercourses downstream of the point furthest upstream from where they finally narrow to 3 metres. This would include any narrower reaches between the '3 metre point' and the mouth. This same width criterion should also be used to determine Crown ownership of river and stream beds (refer section J). 3 metres is a long established bed width criterion for creating the Queen's chain along river banks.
- Review exemption provisions in RMA 1993 amendment and Conservation Act to ensure greater provision of esplanade reserves and marginal strips. *Level 2*
- Extend creation of esplanade reserves and marginal strips to sale of land to incoming overseas owners or Crown lessees as condition of Overseas Investment Commission approval. *Level 3*

4. Restore the 'Queen's Chain' to esplanades

In 1993 the then National-led Government introduced major changes to the esplanade provisions of the Resource Management Act. The most significant change was the introduction of a new category of esplanade – 'esplanade strips', which unlike their Conservation Act namesakes – marginal strips, are not public reserves. These were introduced to provide an alternative to esplanade reserves along water margins.

At the time there were claims from the land subdivision sector that the RMA was not working and that rural subdividers were being unduly penalised by requirements to create reserves. There was a very assertive private property rights ideology being advocated at that time. This denigrated the long-standing concept of reserves

contributions from developers as compensation for the adverse environmental and social effects of their subdivisions. Public reserves were simplistically portrayed as confiscatory of private property rights. The predictable consequence has been realised – few if any esplanade reserves are now being created.

Esplanade strips consist of easements over private land, granting variable rights of public access along shorelines, if at all. The strips remain in private ownership, as do the beds of adjoining private water courses. There are no restraints on land use or potential obstructions within esplanade strips. Consequently many are obstructed and serve no public purpose. There are extensive provisions for closure to the public. The terms of the agreements for strips can be modified or even extinguished in total without public notification or objection procedures. These are effectively private arrangements between local authorities and individual land owners. If local councils are disinterested in upholding their terms there is little disaffected members of the public can do. They are proving to be no more than "paper access".

One positive aspect of esplanade strips is that they are movable with changes to adjoining watercourses, whereas esplanade reserves are not. However it was unnecessary for private ownership to be retained as a prerequisite of movability. The proof is that marginal strips created since 1990 are movable, despite them being publicly owned reserves.

Esplanade strips are the antitheses of what the 'Queen's Chain' is supposed to be about – reservation in public ownership and control of water margins for a variety of public purposes, including access. Public reserves have proved essential to prevent inappropriate development and to provide assured public access to and along water margins. The New Zealand public has been seriously short-changed by the 1993 gutting of the esplanade provisions. As esplanades provide the only way of extending the 'Queen's Chain' over private land, and so complete national coverage along water margins, it is essential that esplanades be restored as public places.

The most perverse aspect of the 1993 changes is the redefinition of the purposes of esplanade reserves as well as strips. Esplanades are, by dictionary definition, "public promenades". However they can now exist solely for conservation purposes, with no provision for public access. These changes were not for conservation enhancement per se but as a mechanism for shutting the public out – keeping private land private, and making newly created public reserves private. This was a cynical action by a previous Government to satisfy rapacious self interests. Rectifying this situation would be entirely consistent with Labour's election policy "to extend the 'Queen's Chain' ".

Action:

- Repeal ability to create further esplanade strips. *Level 3*
- Convert all existing esplanade strips into esplanade reserves (of same width) or require esplanade reserves in their place at next resource consent application. *Level 3*
- Make all esplanade reserves movable. *Level 3*
- Reestablish public access and recreation as the primary purposes for all esplanade reserves. *Level 2*

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I. Recording marginal strips – ‘Queen’s Chain’ & ‘Reclaiming information’

Recording of marginal strips on cadastral records (record maps/survey plans/certificate of title diagrams) has been highly variable over time. While notations used have been inconsistent and possibly confusing to the uninitiated, the depiction of narrow strips of land with parallel boundaries beside water bodies gave clear indication that some kind of reserve exists, and is therefore available for public use. For most people that is all the knowledge necessary to access and enjoy water margins. It was only if a problem arose and someone contested the assumed public status of the land that it became necessary to make further inquires. Compared to today, in the recent past it was relatively easy by visiting the regional survey office, inspecting relevant record maps to get plan references, and then asking to either see (at nil cost) or buy copies of relevant plans. The latter would provide conclusive evidence of land status, and survey data sufficient for locating boundaries in the field if necessary.

Until abandonment of the printed NZMS 261 cadastral map series, the parallel water-ward and land-ward boundaries of all marginal strips were shown. While these could not be distinguished from public roads, being usually of the same width, this record provided a convenient starting point for any member of the public to determine that either a Crown land strip (section 58 Land Act, latter to become marginal strips) or a road existed along a particular alignment. These maps could be overlaid on the NZMS 260 topographic series, being of the same scale, to quickly determine the location of waterside reserves. Low tech, but workable.

The cadastral recording of solid line boundaries for fixed position reserves (includes esplanade reserves and pre 1990 marginal strips) remains unchanged. As set out in section F, the problem is now that this record is effectively inaccessible to the public.

A combination of legislative changes to accommodate the setting up of SOE’s, computerisation of the record, and the introduction of movable marginal strips in 1990, lead to the current situation whereby there is no certainty as to either the existence of many newly created marginal strips, or of their location if such exist. If DOC doesn’t know the location of many of these conservation areas, how is the public expected to know?

To accommodate the rapid establishment of SOE’s, instead of the historic practice of defining the position of marginal strips prior to disposition of Crown land, a mechanism was devised of including marginal strips *within* the parcel boundaries of newly issued certificates of title. This was with a statutory ‘deeming’ or exclusion of marginal strips along qualifying water margins. A memorial or notation on the title was added “subject to Part IVA Conservation Act 1987” (the marginal strip provisions). The trouble is, this notation does not tell if strips actually exist – unless some express action has been taken to define them.

While District Land Registrars only have a duty to make notations on certificates of title as to Part IVA, Chief Surveyors are required to cause plans “to show the marginal strips”. Often they do not because Chief Surveyors have discretion to show these “in the manner they consider most appropriate”. Usually a simple notation, in the absence of any depiction of boundaries on plans, is all that is recorded, despite this failing to meet the statutory test of “showing” the strips. There is no legal requirement to survey marginal strips, however this does not preclude showing their location on survey plans, many of which are compilations of existing records, in the absence of new field survey. Or they can be simply added to plans already in preparation to raise freehold title, at minimal or no extra cost. While the existing “notation only” practice *may* discharge Chief Surveyors’ legal obligations, this fails the public purpose behind these reservations. If no one knows where the strips are, they serve no purpose. This is a compelling instance where public purpose needs to direct bureaucratic practice, not the reverse.

It is essential that whatever means is devised to show marginal strips on plans there is some kind of spatial depiction of them – the reach of water margin reserved (i.e., start point and end point) and the width from the bank or high water mark. There must also be a notation recording the legal status of the land. Notation alone completely fails to satisfy the public need.

There have been a variety of reasons officially advanced for not "showing" movable marginal strips on plans. One is that movable strips have no fixed boundaries and area and are therefore incapable of being shown. This view has been influenced by the design of *Landonline*, which is generally understood to be unable to accommodate voids – anything that is not a defined parcel of land. However there are ways of depicting non-parcel boundaries (see below).

An apparently compelling argument for non-action is that survey is claimed to be needed, therefore there are prohibitive costs involved. Contradictorily, "no survey is required by law, therefore strips can't be shown on plans" (the absence of field survey does not necessarily preclude depiction on plans). The overall tone of official advice to Ministers, as conveyed to NGO's, is that the matter is highly complex and technical and showing strips in a graphical manner cannot be done. Well it can, as evidenced by the Surveyor General's Rules for Cadastral Survey 2002.

The best graphic definition from a public viewpoint would be parallel solid lines, which unambiguously depict boundaries, as is the historic and continuing practice for fixed marginal strips, esplanade reserves and roads. **Commonality and simplicity of recording is the key to public identification of public lands.** The Rules for Cadastral Survey (pp. 25, 33) require the depiction of boundaries that are also parcel boundaries with heavy weight lines (linework 0.7 mm wide / 3 point for digital plans). Boundaries, other than parcel boundaries are to be shown in lighter linework (0.55 mm / 2 point). Application of these rules to movable marginal strips would mean water-ward parcel boundaries in heavy weight lines and land-ward non-parcel boundaries in lighter lines. 'Internal' marginal strips within parcels would have both boundaries in lighter lines. These instructions establish that it is not an absolute requirement that a parcel boundary is necessary to depict boundaries with solid lines. It would be essential that the accompanying land status notation record the exact nature of the strip e.g. "marginal strip (movable)" or "marginal strip (fixed)" as applicable.

The Cadastral Survey Guidelines (April 2002) currently require that movable marginal strips be depicted on plans without a land-ward boundary but with arrows from start point to end point, accompanied by the notation "Subject to S24 Conservation Act 1987 (Marginal Strip) 20m wide". Unfortunately such notation is both ambiguous and imprecise. "Subject to" can imply "subject to future provision" in the same manner that "subject to Part IVA" on titles can imply that on future disposition marginal strips may be created. "S24" does not specify the legal origin of a strip and thereby whether it is fixed or movable. Preferable alternative notations include –

"Marginal Strip S24(1) Conservation Act 1987 (movable) 20m wide"
"Marginal Strip S24(2) Conservation Act 1987 (movable) 20m wide"
"Marginal Strip S24(3) Conservation Act 1987 (fixed) 20m wide"
"Marginal Strip S24(9) Conservation Act 1987 (movable) 20m wide"
"Marginal Strip S24E Conservation Act 1987 (movable) 20m wide"

Such notations are unambiguous as to the existence of a strip, it's legal status, movability, and width. This would satisfy both public and recording needs. Depiction by arrows must be conditional that these and accompanying notations appear in spatial view of *Landonline*. It should be unnecessary for the public to obtain survey plans or certificates of title to discover the existence of marginal strips.

RECORDING MARGINAL STRIPS STRATEGY

Action:

- Preferably record all marginal strips on plans by showing solid line boundaries with notation as marginal strip, legal authority, movable or fixed, and width *Level 1*
- Second preference is continued parallel boundaries for fixed strips with notations as above, and for linear depiction of length by arrows if viewable on *Landonline* for movable strips with notation recording as marginal strip, legal authority, movable, and width *Level 1*

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J. River Beds – 'Securing public ownership and public recreation'

River beds provide the setting for a wide range of active and passive recreations. Rivers are part of the national consciousness, almost to the same extent as the coast and beaches. Despite their national importance as public open space, they have been taken for granted, with few if any protections of the public interest and no entitlement for public use and enjoyment. It would be a shock for most people to learn that there are no rights of recreation over Crown owned river beds (this is by tolerance only), and that the Crown is not required to retain the beds of fresh water rivers in Crown ownership. Note that natural water is incapable of ownership by anyone, including the Crown. This flowing resource is part of "the commons".

Under the Land Act, all Crown land is legally closed to public access. The public are trespassers. However, the public commonly access Crown lands such as riverbeds.

LINZ proposes changes to the Land Act by continuing to apply the trespass provisions to all Crown lands; but specifying that the Chief Executive of LINZ has the discretion to grant a general licence allowing access to certain Crown lands. As of right access to all Crown lands is unnecessary, however public expectations for Crown owned riverbeds are such that as of right access should be granted by statute rather than by revocable executive whim. There is no good reason for discretionary exclusion of low impact access and recreation.

In 1999 LINZ stated that "consistent with Government's policy objective of divesting itself of its interests in land, LINZ has for some time being devolving to territorial authorities responsibility for the control and management of lake and river beds". LINZ also identified a conflict between common law and Maori customary law over bed ownership. It appears that, in the absence of any statutory or policy bar to disposal, **LINZ regards Crown river and lake beds as "unallocated" or "surplus" Crown land, waiting for a new owner**. Such a position is completely at odds with public expectations, and the statutory requirement to "reserve from sale or other disposition" river and lake banks by the creation of marginal strips. Reserves along banks become pointless if the adjoining beds are privatised. Immediate Government review of this inexplicable contradiction is necessary.

The Property Law and Equity Reform Committee (1981) concluded that least one thing about river beds can be asserted with confidence and with which there is really no room for disagreement –

> ''The law in New Zealand as to the ownership of riverbeds is indeterminate''.
> J. A. B. O'Keefe. *The Law and Practice Relating to Crown Land in New Zealand* (1967).

There exist three classes of water which must be distinguished to ascertain ownership of the underlying bed –

1. Tidal.

At common law the bed of all tidal waters, including rivers where the tide ebbs and flows, is prima facie vested in the Crown, up to the line of the ordinary high water mark. The Magna Carta in 1215 established **public rights of fishing and navigation in tidal waters** and in the lands washed by the tides. However there is no general right of public recreation.

All tidal waters in which navigation is possible are by common law deemed navigable, and are consequently subject to the right of public navigation.

The right of navigation in public waters is a right of way in favour of the public for all purposes of navigation, trade and intercourse, and at common law the public have a right paramount to that of the property rights of the Crown and its grantees to navigate over every part of a public navigable river.

A navigable river is **a public highway** navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. At common law the public have **a right of navigation** in all tidal navigable waters and the fact that the tide ebbs and flows in a particular place is prima facie evidence that such place is navigable and therefore subject to the public right.

The right to navigate extends prima facie over the whole tidal area and is not suspended when the tide is out or too low for vessels to float.

The right of navigation includes all such rights necessary for a full and convenient passage along its channel. A vessel is entitled to remain in one place until the weather permits it to leave, or until it has obtained a cargo, or completed repairs, but a vessel cannot remain permanently moored because such permanent occupation by one person to the exclusion of the public is a violation of their right of free passage. The right to anchor or moor is an incident of the right of navigation. There is no common law right to maintain permanent moorings on a person's land without his permission although such a right may arise by custom or statute. There is no general right to land or embark either passengers or goods on the foreshore, other than places appropriated by usage, grant or statute for such purposes, or with the consent of the owner.

Tidal river beds are within the meaning of 'foreshores'. By statutory action such parts covered and uncovered by the flow and ebb of the tide at mean spring tides are lands of the Crown "and **shall be held by the Crown in perpetuity** and shall not be sold or otherwise disposed of except –

"(a) Pursuant to the Resource Management Act 1991; or

"(b) By the authority of a special Act of Parliament; or

"(c) By a transfer to the Crown, where the land will not be land to which the Land Act 1948 applies".

Foreshore and Seabed Endowment Revesting Acts 1991, 1994,

2. Non-tidal and navigable.

The Crown owns all navigable river beds by legislative vesting, except where there is private title.

An examination of some South Island river beds suggests that there has been considerable erosion of the Crown title, frequently by the movement of the riverbed across private title. However the notion of loss of Crown ownership with river movement was questioned by the Property Law and Equity Reform Committee ("it appears that if a navigable river abruptly changes course, the bed of the ''new'' river will presumably vest in the Crown under section 261 Coal Mines Act").

The English common law rule that the public have **no right to fish** in non-tidal rivers has been modified in New Zealand as the Crown has been deemed to be the owner of all navigable river beds, and the Crown has **tolerated** such use as owner.

A navigable river is **a public highway** navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. The public right is paramount to that of the property rights of the Crown.

Tidal navigable rivers can only be disposed of by special legislation. There appears to be **no statutory prohibition on the Crown disposing of non-tidal riverbeds to private interests.** This is a major anomaly,

given the intent of 'Queen's Chain' reserves ("reserved from sale or other disposition") along river banks. Active consideration was given by Government to disposing of both river and lake beds to SOE's in the late 1980's. It was only as a matter of policy, rather than through any legislative restraint, that this did not occur. The State Services Commission recommended that river and lake beds be held as "unspecified lands of the Crown". That means subject to the Land Act, with on-going ability for sale, or disposition by lease or licence.

'Navigability' as a determinant of Crown ownership is very uncertain as to its application, in terms of classes of vessel, whether commercial or for pleasure, and 'navigable' – at what time – now or when the law was first passed in 1903 or at some other time.

3. Neither tidal nor navigable.

The bed of a non-tidal, non-navigable river is presumed to be vested in the owners of the banks up to a boundary midway between them i.e. whoever owns the bank, also owns the bed. The *ad medium filum* doctrine is a well-established principle in New Zealand. However this presumption is rebuttable. **Beds can be in either private or Crown ownership, depending on bank ownership.**

The Crown owns other river beds and lake beds where it has title to them as part of a larger land title (for example all rivers and lakes within Fiordland National Park).

It appears that in respect of private river beds there are no public rights to enter or for recreation Assumed to be occupied private property subject to the Trespass Act.

The owner of the riverbed cannot injuriously interfere with the flow of water or publicly owned rights (if any) and the boundary of his land is liable to change as the river changes course.

The title to a non-title river bed may be conferred by express grant from the Crown i.e. there are **no prohibitions on disposal, except in the circumstance below.**

Section 24F of the Conservation Act 1987 establishes that "notwithstanding any other enactment or rule of law, where the Crown owns part of the bed of a non-navigable river or stream adjoining any land (being a bed of not less than 3 metres in width) and disposes of that land, that part of the bed of that river or stream shall remain owned by the Crown". This presumably is because of a reasonable presumption that if the banks become Crown-owned marginal strips, the adjoining beds should remain Crown owned. However this provision, in the absence of a reservation that the beds remain free of disposition other than sale, does not necessarily inhibit lesser forms of disposition such as leasing, with occupation rights and power to exclude others.

The former Harbours Act control of the waters and beds of navigable rivers is now under the Resource Management Act. Control of rivers is now vested in regional councils.

Section 13 of the Resource Management Act provides restrictions on certain uses of river beds. No person may enter or pass across the bed of any river; or in a manner that contravenes a rule in a regional plan or proposed regional plan unless that activity is expressly allowed by a resource consent; or was lawfully established before the proposed plan was notified.

These provisions provide a continuation of controls or prohibitions over public activities. Other than navigation over navigable rivers there are no "lawfully established" rights of recreation that are beyond restriction or

prohibition. Therefore the common law presumption of river beds being the private property of the Crown remains, with recreation only by sufferance. Regional councils can pass rules and bylaws to control (rather than authorise) public recreation. However such an approach is in conflict with legitimate public expectations and perceptions that there are (or should be) public rights of access and enjoyment over riverbeds, as reflected by the matter of national importance in the RMA (s6(d)) to "recognise and provide for…the maintenance and **enhancement** of public access to and along the coastal marine area, lakes, and rivers". If Government is serious about fulfilling its undertakings to the electorate that "New Zealanders have ready and free access to our waterways", it will need to adopt a far more permissive approach to the public over its otherwise private riverbed estate.

RIVER BED STRATEGY

Action:

1. Create statutory prohibition of "sale or other disposition" over all Crown owned river beds. *Level 2*
2. Create statutory rights of public recreation over all Crown-owned river beds unless exclusion by special nature reservation within defined boundaries, with foot and unpowered craft access as of right. *Level 3*
3. Provide a public process for creating additional rights of use and their regulation. *Level 3*
4. Abolish navigability presumption for Crown ownership of river beds and replace with a minimum bed width criterion of 3 metres. *Level 3*

   Explanation:

   3 metres is the average width minimum that is the historic basis for determining whether of not to create marginal strips and esplanade reserves along river banks. The PANZ proposal would result in a change to 3 metres minimum, which is how the current law is generally applied in practice. Although this width is intended for determining if river bank reserves should be created at a time of land disposition or subdivision, it could also be used for determining ownership of river and stream beds independent of 'Queen's Chain' considerations. Whatever width is chosen will be imperfect and arbitrary, however adoption of a 3 metre minimum bed width would be a considerable advance on existing antiquated and uncertain riverbed law. 3 metres is a long-standing measure used for determining if marginal strips or esplanade reserves are required.

   A minimum bed width of 3 metres would need to be applied to take into account variable bed widths. Generally rivers and streams narrow closer to their source, however constrictions occur with wider beds upstream.

   We recommend that Crown ownership vests in the beds of all rivers and streams to the point furthest upstream that they finally narrow to 3 metres. This would include any narrower reaches between the '3 metre point' and the mouth. Such vesting would parallel the Crown's recent statutory actions to revest in itself the ownership of foreshores and sea bed.

   The primary requirement for any width criterion is on-the-ground certainty for the public and adjoining land owners. A 3 metre rule would in most situations provide a readily determinable limit of Crown ownership, and conversely private ownership. In cases of dispute there could be a requirement for the Crown to peg or mark the upstream extent of its ownership. Adoption of a 3 metre minimum, on the basis above, could also provide the future determinant for the provision of esplanade reserves and marginal strips along the banks (refer section H). If so, compatibility between bed and bank ownership would occur over time.

   River bed is defined in the Resource Management and Conservation Acts as "the space of land which the waters of the river cover at its fullest flow without overtopping its banks".

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K. Lake Beds – 'Securing public ownership and public recreation'

The Crown has made attempts, unsuccessfully, to get the Courts to decide as a matter of law the ownership of inland navigable lakes in New Zealand.

The Crown has no prima facie claim to the bed of any inland lake. A lake in contemplation of English law is merely land covered by water, and will transfer in ownership by the description of the land. Where an inland, non-tidal lake is situated entirely within the boundaries of a title, the bed of the lake is owned by the registered proprietor. Where land abuts a lake, the position is not so clear. Some lakes in New Zealand have the beds vested in the Crown by statute, but there is no common law presumption that the Crown owns the bed of a lake, no matter what its size.

Although it is more or less apparent that the *medium filum* rule applies to the beds of **small lakes**, with ownership vested in the adjoining owners, there seems to be considerable doubt about its application to large lakes. A **large lake** may be owned by adjoining private owners. However many large lakes are Crown owned. Exactly when a lake ceases to be a small lake and becomes a large one has not been definitely decided, although American Courts have drawn a distinction between navigable and non-navigable lakes and ponds, and in the case of the latter it has been held that the *medium filum* rule applies.

It has been ruled that the *ad medium filum aquae* rule is not applicable to **marine lagoons**, but it might be supposed that a lagoon could, in the strictest sense, be termed part of the sea only provided it were subject to the daily influence of the tides.

Generally, the bed of an **artificial lake** if part of a public work, would be in the ownership of the Crown or of the local authority undertaking the work. The boundary of an artificial lake will be a fixed boundary and usually includes a strip of land around the margin of the lake.

The former Harbours Act control of the waters and beds of lakes is now under the Resource Management Act. Control of lakes is now vested in regional councils.

Section 13 of the Resource Management Act provides restrictions on certain uses of beds of lakes. No person may enter or pass across the bed of any lake; or in a manner that contravenes a rule in a regional plan or proposed regional plan unless that activity is expressly allowed by a resource consent; or was lawfully established before the proposed plan was notified.

These provisions provide a continuation of controls or prohibitions over public activities. Other than navigation over lakes there are no "lawfully established" rights of recreation that are beyond restriction or prohibition. On Crown owned lakes recreation is only by sufferance. Regional councils can pass rules and bylaws to control (rather than authorise) public recreation. However such an approach is in conflict with public expectations and perceptions that there are (or should be) public rights of access and enjoyment over lakes, given the matter of national importance in the RMA (s6(d)) to "recognise and provide for… the maintenance and **enhancement** of public access to and along the coastal marine area, lakes, and rivers". If Government is serious about fulfilling its undertakings to the electorate that "New Zealanders have ready and free access to our waterways", it will need to adopt a far more permissive approach to the public over its otherwise private lakebed estate.

LAKE BED STRATEGY

Action:

- Create statutory prohibition of "sale or other disposition" of lakes in Crown ownership. *Level 2*
- Create statutory rights of public recreation unless statutory exclusion by reservation within defined boundaries. A presumption of pedestrian and raft/unpowered craft recreation in all areas, with public process for additional rights of use and their regulation. *Level 3*

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L. Bathing at the beach – ‘Overturning antiquated law – securing public recreation’

It will be something of a surprise to most New Zealanders, despite a long-established tradition of public recreation and usage of foreshores-beaches, that the common law has consistently denied the public any recreational or general rights to use the foreshore, except for limited purposes incidental to navigation and fishing in tidal waters. There are no statutory rights of recreation, only controls. Use is only by sufferance of the owner, the Crown. Whereas most people consider that they have a legal right of recreation over beaches.

The coast is the primary focus for outdoor recreation pursuits of ordinary New Zealanders. A 1981 national survey found that 79 per cent of respondents had visited beaches and the coast during the previous year (usually with multiple visits), compared to 50 percent for lakes and rivers, 38 per cent for forests, and 26 percent for mountains. A summer survey in Christchurch in 2001 found that 95 percent of respondents found the coast and beaches the most popular setting for recreation, the urban fringe 77 percent, rivers and lakes 71 percent, parks and reserves 59 percent, and farm land 43 percent.

The foreshore (or ‘seashore’) is that part of the seabed (and a river) that is covered and uncovered by the ebb and flow of the tides.

High water marks can have differing legal definitions, and positions, such as “mean high water” and “mean high water springs”. Application of different definitions of high water mark under different statutes at different times, has resulted in confusion as to the ownership of what can be significant strips of land above high water mark. This confusion continues.

‘Beaches’ are legally part of the foreshore. The land above beaches, also included within popular perceptions of “the beach”, are dry lands with different legal status and requiring different mechanisms for improving public access. The future of water margins is considered in section H.

The Crown owns all foreshore (including estuaries, tidal river beds, and ‘beaches’) and sea bed (by common law) and seabed (by legislative vesting), except where there is a surveyed title**. The foreshore is deemed to be the private property of the Crown** even though this ownership is clothed with the law/rights of *jus publicum.*(‘public law’).

The proportion of private title is probably very small (less than 1% of the coastline), but is concentrated on the crucial land/sea interface. Private title may have been created as a result of surveyors using the mean low water mark instead of the mean high water mark as the baseline for surveys of coastal properties. In some cases, such as the Manukau Harbour, significant stretches of the coast were treated in this way. In other cases the land may have eroded, creating new foreshore and seabed where there was a dry land title. So-called ‘blue water title’ for private owners will be gradually reclaimed for Crown ownership under the provisions of the Foreshore and Seabed Revesting Act 1991.

The Act vests ownership of the foreshore in the Crown except any vestings in harbour boards or local authorities and for freehold disposals by them prior to 1991. **It is to be held by the Crown in perpetuity** and not sold or otherwise disposed of except under the Resource Management Act or by special Act of Parliament. It shall be managed so as to protect, as far as is practicable, the natural and historic resources of the land. It is a shifting or moveable freehold varying as the sea gradually and imperceptibly recedes or encroaches.

There has been a succession of claims by Maori to ownership of foreshores, culminating in the Ninety Mile Beach case. These claims have been rejected by the Courts however they have not been prepared to base their decisions on any prerogative rights on the part of the Crown.

The 1963 Ninety Mile Beach case was an attempt to assert that the Maori Land Court had jurisdiction over the foreshore and could issue titles over it. However the Court held in favour of the Crown by virtue of section 150 of the Harbours Act 1950 and by deciding that the Maori Land Court had no jurisdiction to investigate title to the foreshore.

The issue of rights of control over the foreshore remains. This is shown by claims to the Waitangi Tribunal to Lake Ellesmere, Manakau Harbour, Napier Inner Harbour, Kawhia Harbour, Kaipara Harbour, Maketu Estuary, Marlborough Sounds, Tauranga Harbour, Whaingaroa Harbour, Tikouma Harbour and Ninety Mile Beach. However the Tribunal's powers are principally recommendatory only, and cannot be compared to those of a Court.

It has been clearly laid down in a judgment that in England the foreshore was the sole property of the Crown and that there was in fact no right, unless specifically granted by the Crown, to do more than land boats in cases of emergency only.

The only public rights over the sea and foreshore are navigation and fishing. There is no right in the public to pass and repass over the foreshore for all purposes. i.e., there is no 'public highway' along the foreshore. The only clear right of the public on the foreshore **is the right to pass over it in boats when it is covered with water for the purpose of fishing**. It would seem that the right of fishing would not include fishing from the foreshore. The leading case is *Blundell v Catterall 1821 (UK).* It was held by the majority of the court that **the public at common law have no right of bathing in the sea or of crossing the foreshore for that purpose**. *Blundell's* case has only been expressly followed in New Zealand in *Crawford v Lecren (1868)* where it was held that there was **no common law right of loading and unloading goods upon the foreshore.**

The right of the public to use the foreshore in the case of emergency or necessity is recognised. Fishermen have the right to use the land above the mean high-water mark in the case of peril or necessity.

> "Of all places of public resort the seashore is probably the most popular".
>
> "It is therefore somewhat surprising that although the seashore is publicly owned, members of the public appear to have no legal rights over it. That appears still to be the position at common law notwithstanding that common activities such as bathing (both in the sea and in the sun), surfcasting and general resort by the public to beaches by the sea and on rivers with tidal reaches is tolerated by the Crown or other public owners of the foreshore; and not withstanding also that many of such activities are actually controlled by statutory regulations and bylaws…It is clear that from a long line of authorities that the widespread toleration of those activities does not confer even an implied right to engage in them. Over nearly 150 years all attempts to establish such a right before the Courts have failed". King, A P. 1968. The Foreshore; Have the public any rights over it? *NZ Law Journal* (1968) 254.

Other public ‘rights’

Sand, stone, soil

Gravel, stones and, even when washed up by the sea onto the foreshore, are part of the freehold and belong to the owner of the foreshore, who may deal with as he pleases and license other to do so, provided that such acts do not amount to the removal of a natural barrier against the inroads of the sea, thereby increasing the risk of injury to the land abutting to the foreshore.

Wildfowling

The public have no common law right to kill or hunt wildfowl on the foreshore, when covered with water or not. The right to shoot and take birds on the foreshore is a profit `a pendre, and can only be acquired in the same way and by the same class of persons as other profits `a pendre are acquired. As the public at large is incapable of acquiring a profit `a pendre, there is no general right to shoot over the foreshore, either when the tide is in or when it is out. The same rule applies to channels of tidal rivers and to the sea, for the public has no right to use the highway of such tidal water for such a purpose.

Seaweed

There is no general common law right for the public to enter the foreshore for the purpose of taking seaweed.

Seaweed cast above the high-water mark is the property of the owner of the land there, and when cast on or growing on the foreshore is the property of the owner of the foreshore, who can maintain trespass against anyone who takes it. However drifted and ungathered seaweed cannot be the subject of theft.

Seaweed below the low-water mark is the property of the Sovereign.

Shells

It is doubtful that the public has any right to take the shells of sea fish left upon the shoreline.

The former Harbours Act control of foreshores is now under the Resource Management Act. Control is now vested in regional councils.

Section 12 of the Resource Management Act provides restrictions on the coastal marine area, including foreshores. No person may carry out any activity in a manner that contravenes a rule in a regional plan or proposed regional plan unless that activity is expressly allowed by a resource consent; or was lawfully established before the proposed plan was notified.

These provisions are a continuation of controls or prohibitions over public activities. They do not create any rights. Other than navigation and associated existing rights there are no “lawfully established” recreational activities that are incapable of restriction or prohibition. Regional councils can pass rules and bylaws to control (rather than authorise) public recreation. However such an approach is in conflict with public expectations and perceptions that there are (or should be) public rights of access and enjoyment over beaches, etc., given the matter of national importance in the RMA (s6(d)) to “recognise and provide for… the maintenance and enhancement of public access to and along the coastal marine area”. If Government is serious about fulfilling its undertakings to the electorate that “New Zealanders have ready and free access to our waterways”, it will need to adopt a far more permissive approach to the public over its otherwise private foreshore estate. Bathing and walking at the beach should be a right of all citizens. If Government has no intention of preventing such activities, why deny provision for such rights?

FORESHORE AND SEA BED STRATEGY

Action:

· Create statutory rights of foot and bathing recreation over foreshores (boating and fishing rights already exist) unless special reserve (eg nature reserve) port or defence areas within defined boundaries. *Level 3*

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M. Fishing and hunting access – 'Equal access for all'

> *"Labour will–*
> *Protect public sports fishing and game bird hunting and, if necessary, amend the provisions of the Conservation and Wildlife Acts relating to the sale of fishing and hunting rights to close any loophole that permits the sale of access rights for these activities".*

The Conservation Act (section 26ZN) and Wildlife Act (section 23) prohibit the sale of rights to fish for sports fish and to hunt game birds. The intent behind this legislation is longstanding and draws from the same egalitarianism that saw the establishment of the Queen's chain. This provision is intended to secure recreational angling and hunting as non-commercial activities and avoid the privatisation of outdoor sports which had occurred in England.

Both provisions are qualified to allow:

- the sale or letting of fishing rights on licenced fish farms;
- the granting of concessions to fishing and hunting guides; and
- charges made by fishing and hunting guides.

In many respects these qualifications reinforce the intent of the law in respect of the sale of hunting and fishing rights. One option to reinforce the current law is to prohibit the sale of access to fisheries or hunting areas. Another is to remove the right to fish or hunt.

In recent years Fish & Game have been confronted with angler access difficulties in some locations particularly where waterways supporting trout fisheries are surrounded by private land. This is an issue which needs to be addressed by completion of the 'Queen's Chain' and implementation of supporting access initiatives.

In an increasing number of cases landholders are exploiting this lack of public access by granting exclusive use to commercial guiding operations. It is clear that the sale of fishing and hunting rights is not contemplated by the law, however it is not clear that the law allows for the closure of fisheries which have been captured for exclusive private use. Such an action should be within Fish & Game's jurisdiction under the provisions of section 26ZL (see below) but the law in this area has never been tested. If tested and found lacking then a strong case should be mounted for a law change in this area to enable Fish & Game to properly manage public fisheries and game in the interests of all anglers and hunters.

Possible amendments to implement Labour's election policy include–

- Amend section 26ZN(1) Conservation Act to make it an offence to sell or let the right of access to fish in any freshwater. *Level 2*
- Amend section 23 (2) Wildlife Act to make it an offence to let for fee or reward any right of access to hunt or kill game on any land or on any water on or adjoining any land. *Level 2*

Another approach would be to close fisheries to all angling while exclusivity or private or commercial capture of that river, or section of river, was practiced.

"Conservation Act 1987

Section 26ZL Restrictions on Fishing – (1) The Director-General, by notice in the *Gazette*, for such period as may be specified in the notice, may, notwithstanding that it is otherwise lawful under this Act –

(c) Prohibit or impose restrictions or conditions on fishing in any waters or in any specified part or parts thereof, or in the taking of any species of fish therein, or on the methods of fishing in such waters.

(2) Any Fish and Game Council may request the Minister to issue a notice under subsection (1) of this section".

- Amend section 26ZL Conservation Act if required to either give Fish & Game powers to recommend to the Minister, and for the Minister to so instruct the Director General of Conservation, that any rivers or section of rivers be closed to all angling while exclusivity or private or commercial capture of that river has occurred. *Level 2*

It is not in the interests of anglers generally to have fisheries closed for any reason but most would support such action in the longer term interests of the fishery, and anglers in general.

Exclusivity and the capture of fisheries is anathema to the egalitarian culture which has underpinned all previous fish and game legislation, and all recreational fishing ethics.

N. Access action plan

Level 1

Application of existing law (no law changes, just action)

Lost Lands

1. Ensure citizen access to the Crown cadastral record easily, widely and freely.
2. Provision of a free cut-down version of *Landonline* to spatially depict parcel boundaries, including movable reserves, public land notations, survey plan, appellation and title references in 'Spatial View'.
3. Provision of topographic maps with overlayed public road, public land boundaries and status.

Public Roads & Paths

1. **Locate** existing roads that serve a useful recreation or access purpose and establish signposted, obstruction-free public paths.
2. **Relocate** existing roads to more practical routes. Exchange old roads for new roads (local authorities use bargaining power with adjoining land owners).
3. **Dedicate** new roads for foot, cycle, horse, or vehicle passage as the primary public access provision to public lands and waters where existing access is absent or inadequate.
4. **Educate** government and local authority staff about 'The Law of Highways' and their responsibilities. Concurrent public education about rights and responsibilities .
5. Local authorities to instigate a programme involving consultation their own reserves and recreation departments, DoC, Fish & Game, LINZ and the public to identify all legal roads, existing access to public lands, deficiencies, and options for improvement.
6. When creating new access to public lands and waters, preference to be given to dedication of public foot paths, cycle paths, and bridle path, as alternatives to vehicle roads when vehicle access is unnecessary or undesirable.
7. Central Government actively encourage local authorities to define, signpost, and develop 'green roads' for foot, cycle, horse, or vehicle use as appropriate, using unified national standards of marking.
8. In conjunction with local authorities, Government initiate an education programme for roading authorities on 'The Law of Highways'. Concurrent public education about rights and responsibilities.
9. All public road alignments (formed and unformed) be overlaid on LINZ topographical information and made available electronically and by publication.
10. Retain public ownership and control of public roads.
11. Reject any attempt to codify or define/qualify public rights of passage in statute, due to the major risk of reduction in existing rights, and once legislated, the further weakening or revocation of these.

Queen's Chain

1. Require LINZ, in addition to providing necessary notations, to graphically record the existence of marginal strips on all relevant survey plans and in 'spatial view' of *Landonline* (refer to section I for detail of implementation).
2. Preferably record all marginal strips on plans by showing solid line boundaries with notation as marginal strip, legal authority, movable or fixed, and width.
3. Second preference is continued parallel boundaries for fixed strips with notations as above, and for linear depiction of length by arrows if viewable on *Landonline* for movable strips with notation recording as marginal strip, legal authority, movable, and width.

Level 2

Extension of existing law (building on what already exists)

Public Roads & Paths

1. Introduce a legislative equivalent to that in the UK Highways Act creating a duty for authorities in control of roads to assert and protect public rights of passage.
2. Introduce offence provisions for failure to signpost gates as 'Public Road' across formed public roads (an existing requirement, s 344(2) Local Government Act, that is universally ignored).
3. Introduce offence provisions for misleading signs or notices on or near roads containing false or misleading content that is likely to deter public use.
4. Amend statutes to make an existing power of Crown resumption of unformed roads (section 343 Local Government Act) subject to public 'stopping' procedures.
5. Add a requirement to the 10th Schedule of the Local Government Act to ensure retention of property frontage and practical, public access to public reserves, lakes, rivers, and the sea coast when local authorities and the Environment Court make road-stopping decisions.

Queen's Chain

1. Make all tenure reviews and lease renewals involving lands of the Crown conditional on exchange of any fixed marginal strips for movable strips, and the creation of new marginal strips along all qualifying waterways.
2. Amend existing criteria for establishing marginal strips and esplanade reserves:
    - Along shores of lakes 8 ha or greater in area (amendment: for private lands, 2 ha or greater on lands of the Crown).
    - Along banks of rivers and streams if width of beds 3m or more (change from <u>average</u> width).
3. Review exemption provisions in RMA 1993 amendment and Conservation Act to ensure greater provision of esplanade reserves and marginal strips.
4. Reestablish public access and recreation as the primary purposes for all esplanade reserves.

Rivers and Lakes

1. Create statutory prohibition of "sale or other disposition" over all Crown owned river beds.
2. Create statutory prohibition of "sale or other disposition" of lakes in Crown ownership.

Fishing & Hunting Access

1. Amend section 26ZN(1) Conservation Act to make it an offence to sell or let the right of access to fish in any freshwater.
2. Amend section 23 (2) Wildlife Act to make it an offence to let for fee or reward any right of access to hunt or kill game on any land or on any water on or adjoining any land.
3. Amend section 26ZL Conservation Act if required to either give Fish & Game powers to recommend to the Minister, and for the Minister to so instruct the Director General of Conservation, that any rivers or section of rivers be closed to all angling while exclusivity or private or commercial capture of that river has occurred.

Level 3

New law and significant changes

Queen's Chain

1. Make all marginal strips, esplanade reserves, and roads movable along water margins through amendments to the Conservation, Reserves, Resource Management and Local Government Acts.
2. Extend creation of esplanade reserves and marginal strips to sale of land to incoming overseas owners or Crown lessees as condition of Overseas Investment Commission approval.
3. Repeal ability to create further esplanade strips.
4. Convert all existing esplanade strips into esplanade reserves (of same width) or require esplanade reserves in their place at next resource consent application.
5. Make all esplanade reserves movable.

Rivers and Lakes

1. Create statutory rights of public recreation over all Crown-owned river beds unless exclusion by special nature reservation within defined boundaries, with foot and unpowered craft access as of right.
2. Provide a public process for creating additional rights of use over river beds and their regulation.
3. Abolish navigability presumption for Crown ownership of river beds and replace with a minimum bed width criterion of 3 metres.
4. Create statutory rights of public recreation over Crown-owned lakes unless statutory exclusion by reservation within defined boundaries. A presumption of pedestrian and raft/unpowered craft recreation in all areas, with public process for additional rights of use and their regulation.

Bathing at the Beach

1. Create statutory rights of foot and bathing recreation over foreshores (boating and fishing rights already exist) unless special reserve (e.g., nature reserve) port or defence areas within defined boundaries.

Conclusion

41 actions are identified that would allow Government to implement Labour's 2002 election policies for public access to the outdoors–

- 17 actions could be taken immediately. No law changes are necessary.
- 14 further actions could be taken after minor amendments to law.
- 10 further actions could be taken after significant law changes.

Approximately 75 per cent of the identified actions would entail only policy and resourcing decisions, or only minor legislative amendments.

Public Access New Zealand is a charitable trust formed in 1992. The objects are the preservation and improvement of public access to public lands, waters, and the countryside, through retention in public ownership of resources of value for recreation. PANZ is supported by a diverse range of land, freshwater, marine and conservation groups and individuals.