Critique of DOC's 'partnership' response

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The Department of Conservation undertook to non-government organisations (NGO's) to respond to *"The Principle of 'Partnership' and the Treaty of Waitangi"* by Bruce Mason. It did not. Instead, in a letter dated 1 September 1994, DOC (signed by Alan Edmonds) wrote to me in reply to a letter of 22 December 1993 which asked the Director-General of Conservation—

"PARTNERSHIP PLAN

> "It has been announced in a DOC circular that a Partnership Plan Steering Group has been established—
>
> > "to prepare a strategy for the development of a conservation partnership with iwi Maori which contributes to the mission of the Department and to take initial steps towards the implementation of such a partnership".
>
> "Could you please cite the statutory, case law, and constitutional basis for you determining—
>
> > (1) that a partnership exists or should exist between the Crown/DOC and iwi Maori in the ownership or management of lands and natural resources vested under the administration of DOC via the National Park, Reserves, Conservation, and related Acts;
> >
> > (2) the nature of such a 'partnership';
> >
> > (3) as the manager in trust for public lands, that you have power to take steps to divest management or ownership of public resources via partnerships with iwi Maori.
>
> "Could you also inform me of the mission of the Department, and the constitutional and legal basis for its component parts".

I resubmitted the letter on 28 February, 3 March, and 12 April 1994.

DOC's belated response of 1 September states that it is an answer *in general terms*. It also pretends to not know the context in which the issue of 'partnership' was raised by myself. Significantly it does not address most of the critical detail contained in my partnership paper and avoids major areas such as my discussion of the Lands case, the non-implimentation of Government's policy entitled 'Principles for Crown Action on the Treaty of Waitangi', the application of Treaty principles within the department, and the conclusions of my paper.

This critique of the DOC letter of 1 September is confined to commentary on the limited areas the DOC letter covers. Wider matters contained in my partnership paper, as itemised above, are not discussed. There remains need for substantive official responses to these.

The baseline used for this critique is provided by the Department's own recent words on the subject—

> "The Department's interpretation of the [Treaty] principles, as recently outlined to the NZ [Conservation Authority], NGO's and staff, *is based on decisions of the courts in interpreting the law*", D-G Conservation to FMC, 21 July 1994.

Quotations from the DOC response are grouped into key issues for the purpose of commentary—

Issue 1
The context of the SOE Lands case verses that of the Conservation Act

DOC: The requirements of section 4 of the Conservation Act 1987 [are] "weaker than the directive of the State-owned Enterprises Act 1986" (section 8).
DOC: "The meaning of 'principles of the Treaty' will depend on the context in each case".

Commentary: These two quotations challenge the direct application by DOC of principles that the Court of Appeal derived from the Lands case. The Lands case was brought under the SOE Act, not the Conservation Act. As the context of each case and statute is critical to understanding of Treaty principles, DOC cannot safely infer from the Lands case that there is a generic principle of 'partnership' affecting all its functions over all the resources it administers.

Issue 2
Partnership as a 'short-hand' categorisation

DOC: "In respect of the so-called partnership principle, I refer to the Lands case. A reference to the concept of partnership or to the partnership principle *is a short-hand* for the observations of their Honours that the Treaty signified a partnership between pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith (per Cooke P at 664, 11; Richardson J at p 673, 1 50; Somers J at p 693, 1 5; Casey J at p 702, 1 32; p 703, 1 6 [incorrect reference?]; Bisson J at p 715, 1 27).

Commentary: The relevant citations from the Lands case are as follows (emphasis added)—

Cooke P at 664, line 1; "The Treaty *signified* a partnership between races, and it is in this concept that the answer to *the present case* has to be found".

Richardson J at p 673, line 50; "That basis for the compact requires each party to *act reasonably and in good faith* towards the other".

Somers J at p 693, line 5; "Each party in my view owed to the other *a duty of good faith*. It is the kind of duty which in civil law partners owe to each other".

Casey J at p 702, line 32; "...it is not difficult *to infer* the start in 1840 of *something in the nature of partnership* between the Crown and the Maori people.

At p 703, line 6; "...inherent in the concept of an on-going partnership founded on the Treaty. Implicit in that relationship is *the expectation of good faith* by each side in their dealings with the other, and the in the way that the Crown exercises the rights of government ceded to it" [p 603, lines 1-4]

Bisson J at p 715, line 27; "The passages I have quoted from the speeches of two Maori chiefs and from the letter of Governor Hobson enable the principles of the Treaty to be distiled from an analysis of the text of the Treaty. The Maori chiefs looked to the crown for protection from other foreign powers, for peace and for law

> and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of *the utmost good faith* in the manner in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full and undisturbed possession of their lands *which is the basic and most important principle of the Treaty in the context of the case before this Court"*.

Commentary: The Judges did not state that partnership was 'short-hand' for the relationship they deemed to exist between the Crown and Maori. It is DOC's interpretation, not that of the Courts, that 'categorises' the relationship as one of 'partnership'. In the Lands case the Judges defined the relationship as requiring reasonable action and good faith between the parties. Later, in the Forest case, the relationship was deemed to be founded on "reasonableness, mutual cooperation and trust".

The Judges did not categorically state that a partnership existed. They said that the relationship *signified* and *inferred*, *something in the nature of* a partnership. Elsewhere in the Lands case Casey J said that it was a relationship *akin to* partnership (p 704 line 16). The judgements have not defined what is meant by 'partnership', other than the characteristics noted in the above paragraph.

Definition:
Signify: " Be a sign or indication or presage of", Concise Oxford Dictionary, Seventh Edition.

Issue 3
An 'overarching' principle?

Broadcasting assets case: citation per DOC: "their Lordships provide their opinion on the nature of the principles of the Treaty categorising them as "*underlying* mutual obligations and responsibilities...this relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust".
Commentary: Their Lordships categorise the principles as underlying not as 'overarching'.

DOC: "This relationship is that which in earlier cases has been *categorised* as "partnership".
DOC: "The foregoing brief review of some of the relevant case law shows that the concept of partnership can be *categorised* as an overarching principle".
Commentary: this is a DOC categorisation; it is not to be found in the cases.

DOC: "...*the overarching principle* identified by the Court of Appeal using the term "partnership" (NZ Maori Council v Attorney-General [1987] 1 NZLR 641 - "the Lands case").
Commentary: The only reference to an 'overarching' principle has been by Richardson J in the Lands case (p 673 line 43): "There is however *one overarching principle*—to which I shall return—which in its application here is sufficient to answer the present case. It is that considered in the context of the State-Owned Enterprises Act, *the Treaty of Waitangi must be viewed as a solemn compact between two identified parties*, the Crown and the Maori, through which the colonisation of New Zealand was to become possible".

DOC again: "The foregoing brief review of some of the relevant case law shows that the concept of partnership *can* be categorised as *an overarching principle".*
Commentary: This is DOC's interpretation of the case law, not that expressly derived from the cases. Richardson J identified 'a solemn compact' as the 'overarching principle', not 'partnership'.

Definitions:
"*Overarch*" : "form arch over"; Concise Oxford Dictionary, Seventh Edition.
Compact: "agreement or contract between two or more"; Concise Oxford Dictionary, Seventh Edition.

Issue 4
No automatic equality in the relationship

Commentary: The DOC opinion acknowledges from the Forests and Coal cases (DOC paragraph 6) that "with respect to claims to resources" the Courts did not determine that this "automatically require[s] equal shares between the parties". This admission establishes the central flaw in moves towards divesting or 'sharing' ownership or management of public resources with iwi. Such an intent, reinforced by erroneous statements by the Minister of Conservation's that Maori are "equal Treaty partners" with the Crown, has no lawful basis in the management of public lands.

Issue 5
DOC as law maker?

Commentary: DOC's paragraph 8 records "the potential for judicial activism in other areas of law, in particular the approach to the application of Treaty principles", earlier noting "there may be occasions in which there is a moral although not a legal duty to ensure adherence to the spirit of the Treaty by acting in accordance with its principles".

This raises the issue, is DOC to pursue 'moral' or politically correct 'duties' by *anticipating* developments in judicial law making, or follow established law? To pursue the former, as the Department appears to be currently doing on 'Treaty' matters, conflicts with the Department's mission which "is found in the various Acts which it administers and which confer functions upon it" (DOC: paragraph 11).

Conclusions

The DOC response confirms the basis for the central criticism contained in *"The Principle of 'Partnership' and the Treaty of Waitangi"* —that DOC is *extending* the determinations of the Courts, under a mythology of 'partnership', well beyond what the Courts have defined. There is an inherent and inescapable connotation of equality between the 'partners' that make the use of the term inappropriate in the context of the Treaty and Treaty principles.

In common and departmental parlance the concept of 'partnership is ill-defined, confused, and misleading—dangerously so in regard to the Crown's obligations to all citizens.

That danger is manifest in DOC policies for divesting ownership and for 'shared' and 'co-management' of public resources with iwi under an assumption that an equality of partnership exists. Such policies have no basis in judicial or statutory law. They are unlawful.