Public Access to Water A New Zealand Mirage

by John R. Milligan

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In New Zealand there has been a slow and developing legislative recognition of the principle that lakes and rivers ought to be amenities of the general public, available as resources for recreation in the widest sense of that word. A brief summary of the developing acceptance of this principle and of the present situation, however, points to the many deficiencies and to the problems which impede any resolution.

In the early days of New Zealand's colonisation the country was without a system of law, at least as understood in the European sense. There was, at that time, a principle of English Law to the effect that British Subjects took with them such of the Law of England as was appropriate to their circumstances, rather as if that legal system became a personal attribute of such travellers in savage lands. It was not until New Zealand became a colony English Law finally, as it were, settled on the land, and by various *English Laws Acts*, the first of which was passed in 1854, the New Zealand Legislature made it clear that

> "The laws of England as existing on the 14th day of January, One Thousand Eight Hundred and Forty, so far as applicable to the circumstances of New Zealand . . . shall be deemed to continue in force in New Zealand . . ."

Amongst these legal principles which so suddenly became translated to a colonial sphere was the one which stated that, in general, the public had no right of access to lakes and rivers. In England the bed of rivers (and probably of lakes) belongs to the adjoining landowners. Unless there was some specific arrangement to the contrary, ownership terminated at the centre-line of a river, and the public had no more right of access to, navigation over or recreation on a river than they had to any other piece of property privately owned. In England, rights of way could be obtained by prescription, that is, by a continuous and uninterrupted use of land by the public from time immemorial. Such rights could also be obtained by Acts of Parliament. Rights of navigation over rivers could be obtained in a similar way, enabling members of the public to pass along a river, but not (in general terms) to land on the banks, take fish, or (probably) to anchor. Unless public rights of navigation had been acquired, however, the public was out of luck. Rivers were not for the lower classes.

In New Zealand, the tide had begun to turn (if one can use that expression) by 1892. In the *Land Act* of that year there appeared a section which empowered the Governor General, in any case where a survey of land had not been approved by the Chief Surveyor, to exclude from any sale, lease or grant all necessary road lines

> "and to reserve any of the said lands which are situated on the seashore, the margin of lakes or on river banks, all which are required for (certain purposes) without paying compensation for any land so excluded or reserved".

The purposes referred to included

> "The making of gardens, parks, domains or commons, or for the health, recreation, convenience or amusement of the people".

Whether or not such a reservation took place in any particular instance seems to have been a question of policy, left to be determined from time to time, but the effect of any such reservation was clearly expropriatory, disentitling the occupier, the owner or lessee, to that exclusive possession of the margins of lakes or rivers formerly enjoyed. Those margins became Crown property, but it is not clear whether thereby the public necessarily obtained rights of access.

This situation continued more or less unaltered until 1946, in which year the *Land Subdivision in Counties Act* was passed. That Act was intended to amend the successor of the 1892 *Land Act* and for the first time appeared to set up a substantive code for rural subdivision. Section 11 required every scheme plan of subdivision to set aside as reserved for public purposes a one chain strip along the mean high-water mark of the sea and

> "along the margin of every lake with an area in excess of 20 acres, and, unless the Minister (of Lands) considers it unnecessary so to do, along the banks of all rivers and streams which have an average width of not less than 10 feet . . ."

There were exceptions to this, and there were circumstances in which the strip to be provided could be reduced in width, but the intention of this section was clear. It was

> "to give members of the public reasonable access to the sea, lake, river or stream".

Section 11 has been reinacted so that the present situation is substantially as described above. At last "the people" appeared to have been given a right of access to the waters of the country, but that right was more an appearance than a reality.

If the fundamental purpose of the present legislation is "to give members of the public reasonable access' to water, then its implementation is less than satisfactory. To begin with, the obligation to provide such a strip arises only accidentally, in that no reserve need be provided unless and until land is subdivided. Secondly the obligation arises only in respect of the land contained in a scheme plan of subdivision and if a small lot is to be severed from a much larger title only the small lot is liable to have extracted from it an access strip. Thirdly, there is no obligation on anyone to mark the areas over which public rights of access exist, and the general public does not know on what banks it may stray and how far back from the margin of any river or lake public rights extend. To find out these things with any accuracy requires firstly a search of plans in the Land Registry, and secondly a search for boundary pegs or a survey.

Because of all these things, the public is effectively denied access. Many lakes and rivers do not have reserves along their margins; those that do often have reserves which are occupied by adjoining landholders and which, in rural areas, are cultivated or grazed as part of a farm. No-one knows whether they are exercising a public right of access or trespassing on private land, and in either event attempts to gain access may well be resented by farmers who see their crops may be damaged or livestock disturbed.

In a way this state of affairs is typical of much of New Zealand's so-called "Environmental" legislation. Too often such legislation is schitzoid, containing two mutually opposed aims. In the Acts relating to National Parks those opposing aims are the principle of public access, and that of protecting fauna and flora in their natural state. In the present case the desire for public access is opposed to a desire to protect a rural economy.

If these are thesis and antithesis, to date the attempted synthesis has been to proclaim the existence and desirability of a public right, but to deny its actuality. Recent proposed amendments to the Counties Act would have required the creation of access reserves at a much faster rate, and would have compelled an adjoining owner (previously the owner of the strip) to fence off such reserves thus publically proclaiming their position and extent. Farming interests hastened to point out that we were the only developed nation with an agricultural economy and that farming interests could be imperilled by such a move, urban dwellers appeared indifferent to the proposal, and the only group which appeared likely to make some economic gain was the manufacturers of fencing wire.

The present position seems to be
(1) a machinery exists to provide for public access to rivers and lakes

(2) that system works (at least in terms of legal effectiveness) in a slow and patchy way

(3) the public, for whose supposed benefit the system was designed, in many cases do not now whether a right of access exists

(4) powerful economic forces are at work to stop them finding out.

In New Zealand, water is part of the public landscape — if *only* the public can get to it.