Public access campaign launched

'Public Access New Zealand'
No. 1 September 1992

A national campaign has been launched to preserve access over public lands and waters. This is in response to rapidly growing privatisation pressures from a multitude of commercial interests, land claimants, and free market ideologists. 'Public Access New Zealand' intends to remind politicians why our outdoor heritage must remain in direct public ownership and control.

The campaign believes that loss of public ownership and control over New Zealand's outdoors will inevitably result in loss of public access. What most New Zealanders have justifiably believed was an enduring heritage of all the people of New Zealand, is no longer so in the current political climate.

Ideological shifts within the last two governments and the force of the private interests coveting public assets, are such that nothing is safe. Our national parks and other public conservation areas are up for grabs through land claims and commercial pressures. Continuation of such trends could also see public roads, rivers, and water margins privatised and customary rights of recreational use and enjoyment eroded or lost. There are few if any legal barriers in the way of total alienation of all public lands and waters. Even our beaches are not safe in law.

The campaign believes that if privatisation, or moves towards it, proceeds there will be a small number of 'winners' and a vast majority of losers. New Zealanders, from all walks of life, will be adversely affected. Consequently the campaign believes that if the politicians carefully considered the consequences of what the self-interest forces are clamouring for, they would reject their demands. New Zealander's birthright of unhindered public access, irrespective of economic status or cultural origin, is at stake.

Privatisation of publicly owned lands and waters attacks one of the founding precepts of New Zealand society. This is the concept of the 'commons,' areas held in trust by the Crown for the common benefit of all New Zealanders.

Public access has inspirational, recreational, spiritual, health and other benefits. The campaign believes that the vast majority of New Zealanders inherently know that such basic human needs are essential to the well-being of society and cannot be equitably apportioned by market forces.

The concept of private ownership and control over the 'commons' is totally alien to New Zealand. It is also alien to almost 2000 years of international development of civil law (see Appendix One) and common law.

In this inaugural issue we set out our principal concerns and what you can do about reversing trends towards privatisation.
Refer to the following ACTION BOXES.

'Public Access New Zealand'

'Public Access New Zealand' is a coalition of individuals with a wide range of recreational involvements in land, inland water and sea environments. They intend to canvass support from all outdoor recreation codes. Members of the steering committee have extensive contacts with national as well as local recreation and conservation groups.

The campaign believes that there is a huge potential basis for public support. Who after all doesn't visit the beach or countryside, or wish to visit our national parks and reserves? And who doesn't want their children and their children to have such a right?

Privatisation, in a variety of forms, is the common threat to the public estate and public rights of access. The threat extends to all natural and recreational resources.

The threat is so broad and immediate that it is beyond the ambit of any one existing non-government organisation to defend the public estate. Hence the need for this umbrella campaign. The campaign intends to confront the issue of privatisation and to create greater national consciousness of the unique public qualities of New Zealand's outdoors.

The campaign's relatively simple focus on public access through public ownership is unique. It will provide a catalyst and focus for all groups and individuals interested in public access. The campaign intends maintaining public momentum through to the general election next year.

The campaign's goals are—

- The preservation and improvement of public access to public lands and waters and through the countryside in general; and
- The retention in Crown ownership and control of all publicly owned lands with value for public recreation and/or conservation, all inland and coastal waters, and recreational resources therein.

The campaign's interests extend over—

National Parks	Public reserves
Conservation areas	Public roads
Pastoral leases and licences	The 'Queen's Chain'
Crown Lands	Rivers
Lakes	Foreshores/Beaches
Recreational sea fisheries	The Sea
Fresh water fisheries	Game animals

State-owned Enterprise land with public access provisions

Public Access New Zealand P O Box 5805 Moray Place Dunedin

Government has been turned around on public ownership and access issues before. For example, there were notable successes in retaining public ownership of the South Island's 3 million hectares of pastoral high country, in reversing the misallocation of 600,000 ha of conservation and recreation lands to state-owned enterprises, and in protecting public access to the 'Queen's Chain' around New Zealand's shorelines. As in those campaigns it is the intention of 'Public Access New Zealand' to produce well-researched, factual information as the basis for campaigning. Such an approach proved crucial to past successes.

We believe the case for retention of public ownership over public recreational resources is compelling and one that responsible politicians can ill-afford to ignore. The challenge is to ensure that the decision-makers are unable to avoid the public policy issues we raise.

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What are the threats?

The most immediate threats arise —

• On the conservation estate:

- Government's apparent willingness to consider divesting ownership to Maori claimants over national parks, conservation areas, reserves.
- Failure of the Department of Conservation to defend concept of public ownership; being content with just being the manager for whoever owns the land.
- Commercial interests vying for control or ownership of natural resources, public facilities and tracks in Parks.

• In the South Island pastoral high country:

- Government settlement of Ngai Tahu claim by purchasing pastoral leases and apparent intention of handing over freehold ownership.
- Current proposals for selective freeholding of pastoral leases by runholders, with inadequate public compensation by way of access and reserves.
- Runholders pushing for total freeholding of the land or the privatisation of natural and recreational values such as fishing, walking and skiing opportunities.
- Non-surrender back to the Crown of hundreds of thousands of hectares of alpine lands retired from grazing via catchment board run plans.
- Government trend of divesting Crown responsibility for control of pastoral lessees in favour of general land use controls; i.e., the Crown abdicating its responsibilities as landlord.

• To the Queen's Chain:

- Esplanade reserves: Government's intended changes to the Resource Management Act to retain private ownership of shorelines when private land is subdivided.

The origins of Crown lands and public reserves in New Zealand

Since the beginning of European colonisation official efforts have been made to provide public reserves, and public access to lands adjacent to waterways. The Royal Charter under the New Zealand Act 1840 authorised the Governor to dispose of lands in New Zealand under a duty of trust to "...any persons, bodies politic or corporate, in trust for the public uses of our subjects there resident, or any of them."

Queen Victoria's Instructions attached to the Charter required lands in the colony to be reserved and surveyed for several public purposes (see Appendix Two).

The Royal instructions of 1840 contain a specific command to prevent alienation to private interests of lands reserved for public purposes. They also formed the basis upon which subsequent legislation was enacted to create reserves, thus ensuring the preservation of public access to public reserves and waters. Legislative action was first seen in the Land Claims Ordinance 1841. Section 2 provided that the sole and absolute right of pre-emption over lands in the colony was vested in the Crown, and that all existing, or claimed titles, were null and void unless allowed by the Crown. Section 6 specifically recognised the public interest as it provided that no grants of land were to be made within 100 feet of high-water mark of the sea shore. Similarly no other areas required for town reserves or any other public purposes were to be granted to private interests.

The first general legislation providing for the administration of public reserves was the Public Reserves Act 1854. This was the first of a succession of reserves, conservation, and national park Acts to the present day. This is confirmation of the fact that the settlers were determined to get away from the class-based privileges and restrictions of English society. It is these principles behind our legislative and social history as a nation that the campaign embraces.

Why is public ownership necessary?

Free-market notions are currently in vogue within government and even for a few people within the conservation movement. In relation to the management of land (and water) the basic premise is that the state has no useful or beneficial role in its management—private market forces and 'market instruments' are better able to identify needs, remedies, and opportunities for investment and therefore satisfy social goals. The 'trickle-down' theory is that if private interests benefit then the rest of the community also benefit. **In relation to natural lands *held for public use and enjoyment* such notions are a complete fallacy as even the most cursory reflection on human behaviour and history shows—**

1. Inherent conflicts of interest exist between the self-advancement aspirations of individuals, and the community purposes of areas held as public reserves. These areas are primarily spiritual, recreational and natural places, not manageable solely in dollar terms, or for private benefit.

2. Through hard-won and often bitter experience most human societies structure themselves so as to vest separate and potentially **conflicting powers in separate institutions or people.**

3. The availability of natural and recreational areas for public use has to be beyond **the fickle or capricious control of private individuals** who may ration or exclude segments of public use. This is the basic rationale behind Queen Victoria's instructions to Governor Hobson. It is a timeless notion that remains valid.

4. Community ownership and public management of a natural resource, in a democratic society, requires **direct political accountability** for its administration. This is a slow and cumbersome process. Because of this, and the legislative framework under which it operates, it provides the best assurance of protection from exploitation of either the natural resource or the people wishing to use and enjoy it.

5. Public ownership, without property rights being conveyed to vested interests, allows **maximum flexibility** to amend resource management to adapt to ecological, social, and recreational needs. This is within the objectives set by legislation. If there is a pressing enough need to change the rules/law this is by public process with checks and balances built in between public and private interests.

6. In use of land by propertied interests there is often a major gulf between **land occupiers' behaviour or practices** and their knowledge or awareness of conservation techniques and needs. Short term imperatives, often dictated by financiers, usually prevail. As well, exceedingly few groups or vested interests are successful at self regulation, particularly for purposes of little or adverse benefit to themselves. **Direct state policing and regulation is still very necessary to serve community purposes.**

Covenants lack security

Covenants are increasingly touted as the cure-all for environmental protection and provision of public access on private land, and latterly *as an alternative to public ownership of land.*

A covenant affecting land is an agreement usually registered against the certificate of title which binds the parties to do or not to do something. Their terms are usually binding on successors in title. It is possible to establish covenants under the Conservation, Queen Elizabeth II National Trust, and Reserves Acts. In regard to conservation purposes they were originally brought in to conservation legislation to allow the negotiation of restraints over the use of private land, in the absence of the ability to acquire public ownership. This remains a legitimate need.

However in more recent times covenants have been actively promoted by Treasury and more latterly by some public land managers *as the alternative to existing public ownership.* This promotion has been in the absence of any practical experience as to the legal adequacy and durability of such agreements when put to the test by an unsympathetic land owner. Most covenants are general in nature, with more detailed management agreements (not registered against the title) often necessary to give effect to these legal instruments. Most covenants are prepared without public scrutiny as to their adequacy.

The generic limitations of covenants—

- **To be enforceable legal documents they must be explicit and detailed enough to foresee every conceivable loophole and future situation.** i.e. They should be able to withstand the ingenuity of smart lawyers acting for an antagonistic landowner. If it were possible to cover everything this would remove the flexibility needed to respond to legitimate future public needs. Changes can only be negotiated with the agreement of the landowner.
- **Covenanting authorities have proved to be loath to intervene when covenants are breached, more usually acceding to landowner demands to ignore or amend their terms.** Even covenants registered against property titles have proved to be unenforceable. The Courts also tend to uphold private property rights over public interests.
- It has been found that QE II Trust 'whole property' covenants entered into over pastoral leases have been **used to resist tenure changes proposed by the Crown and consequent avoidance of greater levels of protection or provision for public access.**
- To enter into covenants on private land must require the consent of everyone with a registered interest in the land, including mortgagors. This may be difficult to obtain. **The lowest order of protection is likely to be the result.**
- **Most covenants over private lands do not provide for public *rights* of access.** Some provide for access at the discretion of the landowner. This is no advance on the situation applying to other private lands.
- The only substantial body of covenants creating public rights of access and use are on State-owned Enterprise lands. The terms of such are generally vague and inadequate. **Their durability is yet to be tested when SOE lands become privately owned.**
- **If covenants fail it is most unlikely any future government, except in the most exceptional circumstances, would have both the will and the money to purchase the area, assuming a willing seller.**
- **Once land is privatised it is too late to require appropriate changes to the terms of a covenant.** These can only be negotiated and agreed to at the pleasure of the landowner.
- **The Courts and District Land Registrars have the power to modify or extinguish covenants** (section 126G Property Law Act 1952; section 90E Land Transfer Act 1952). This can be instigated at any time by the occupier of the land. There are no provisions for public notification or objection.

The total lack of security for the public interest is the central flaw with covenants.

Ngai Tahu Claim

There have been a variety of contradictory and alarming statements from spokespeople for the Ngai Tahu Maori Trust Board as to their interest in South Island parks. Their land claims arise from past Treaty and other contractual failures by the Crown (see Appendix Four for a summary of land claims and the Waitangi Tribunal's findings).

Board Chairman Tipene O'Regan has variously stated that Ngai Tahu want a form of 'shared interest' with the Crown, or joint or shared 'title'. Conservation Minister Denis Marshall

has confirmed that Government is considering these options.

Outright title is also sought to specific geographic features of particular cultural significance including Aoraki (Mount Cook), the Takitimu Mountains in Southland, and indigenous forests in Southland and on the West Coast (ODT 11/5/92).

Enormous government as well as Ngai Tahu resources went into establishing the validity of the latter's land claims. **The Waitangi Tribunal determined that land west of the Waiau River—now predominantly Fiordland National Park, and from the east coast plains to the Southern Alps Main Divide, were legally purchased by the Crown.** It was also found that the reserves Ngai Tahu wanted at the time of purchase were productive lands such as the North Canterbury plains. They were not the low value wildlands and mountains now included in the public conservation estate.

The only grievances sustained by the Tribunal that affect the public conservation estate concern the Crown Titi Islands, Lake Ellesmere, parts of the Arahura Valley, and Ngai Tahu ownership of greenstone.

Alarm from non-government conservation and recreation leaders concerning claims over conservation estate have been met with responses that public access would not be restricted any further under Ngai Tahu joint or outright ownership and that there is nothing to fear.

What is even more alarming than the Ngai Tahu's obvious designs on any public land as a form of reparation is the apparent willingness of Government to hand over ownership as a cheap option for itself. **The claims over national parks and the high country are publicly presented as having the moral force of a favourable ruling from the Waitangi Tribunal behind them. They do not.**

Mr. O'Regan states that the objective of the Ngai Tahu claims is to provide a sound economic base to fund social, educational, superannuation and health programmes. The Trust has sought shares in Government utilities such as Electricorp as 'obvious targets' but "Government doesn't appear interested as this could depress returns from eventual asset sales to the private sector." Minister of Maori Affairs Doug Kidd claims that the Government is severely restrained as to responses to Ngai Tahu claims as "New Zealand is a bankrupt country" (Radio NZ 11/8/92). Kidd states that the reason for using the public conservation estate for settlement is because it is the biggest area of Crown lands left, while acknowledging that its economic value is significantly less than for SOE's.

While many people who are aware of the nature of past wrongs against Ngai Tahu by the Crown would agree that some form of reparation is desirable, the nature of any settlement is crucial to public acceptance. Unlike SOE's, our national parks are held in trust for the benefit of present and future generations of all New Zealanders. They deserve a higher level of protection from claimants than the now private lands that comprise the vast bulk of the lands that Maori tribes were wrongfully dispossessed of.

The Government of the day and the Crown do not have 'title' or transferable ownership in the sense that Mr. O'Regan clearly seeks for Ngai Tahu. The Crown enjoys 'eminent domain,' a constitutional convention by which the Crown does not, and is not required to have, 'title' (i.e., certificate of title) to prove ownership. Under New Zealand's land registration system certificates of title are only required for private lands. **What Ngai Tahu seeks by way of shared or joint 'title' is a direct claim of private ownership.** To oblige, the Crown would have to cede her eminent domain over the interest transferred to Ngai Tahu, as well as any balance that remains in public ownership. This would need to be transferred to a new legal entity, presumably a Government Minister. **The Minister would then be free to dispose of his or her remaining interest at any time in the same way as an SOE's land holdings can be sold.**

Ngai Tahu have made no secret of their commercial ambitions to achieve their social goals. The activities envisaged include tourism, fishing, forests, and land. While claiming that Ngai Tahu would not obtain any more commercial rights over our parks than other people the reality would be very different.

The Ngai Tahu Trust Board is a private entity where every member has a right of beneficial income from the assets of the trust. There is no intention to have publicly listed shareholdings (Tipene O'Regan Radio NZ 11/8/92). As a private body there can be no question of political accountability for it advancing its own corporate interests, and it would be unreasonable to attempt to impose such.

In the absence of a sound economic base arising from settlement by way of transfer of more profitable assets, there will be unavoidable pressures for development and exploitation of our public conservation lands under shared or joint title. Even if the legislative purposes of national parks remain unchanged it is highly improbable that any government would intervene or sue a co-owner who proves unwilling to implement the principles of the present National Parks Act, particularly if government itself established that conflicting interest.

Mr. O'Regan states that Ngai Tahu is against 'absolutest prohibitions' for conservation (Radio NZ 29/7/92). **This is an early indicator that protecting nature for its own intrinsic worth, as provided by the National Parks Act, is inconsistent with his Board's philosophy.** Additionally a direct conflict of interest would be created when Ngai Tahu is both an approving owner, and a developer requiring control by the same approving authority. Conflicts will also arise with other developers, and also with the public in general who wish to have the parks remain in as natural and non-commercial state as possible while allowing freedom of access. **It is inevitable that natural intrinsic values will become commercial opportunities, the capitalisation of which would directly conflict with the ideals of free public access and enjoyment**. A private owner or co-owner would have a privileged position in relation to others to exploit such opportunities.

Emperor Justinian, Queen Victoria, and our colonial administrators had no difficulty in recognising that inherent conflicts of interest arise between private and public interests, and in ascertaining that public interests must prevail over public resources. Our present-day politicians need reminding of some very basic human history.

Even if a new co-owner or owner was the 'greenest' group in New Zealand they should not be granted control, because whoever controls these lands must be answerable to the people. Private owners are not. It must be acknowledged that public authorities can stray from or be negligent in their role as custodian of the public estate. However there are democratic procedures open to everyone to check such tendencies.

It is for sound constitutional reasons that there are separation of powers and interests within the state (e.g., between the Crown, executive, legislature, and judiciary). It is particularly alarming that the Minister of Justice appears not to draw similar distinctions when he entertains private ownership over lands held in trust for the benefit of all of the people.

How could Maori claimants be accommodated?

If the objectives of Maori claims are confined to the re-establishment of mana and ensuring proper presentation and management of areas of special cultural significance, this is possible without obtaining title and within the terms of the existing provisions of the National Parks Act. Section 4(2)(c) requires preservation as far as possible of archeological and historical sites. Therefore all that is required is the identification of the sites and changes in management plans if necessary.

Specially protected areas can also be created with entry by permit only (sections 12, 13). This has already been done for Maori cultural reasons over a nephrite (greenstone) area in the Mount Aspiring National Park.

If direct tribal input to management of particular parks is desirable, this can be done by extending the membership of conservation boards. This is already the case for Tongariro and Egmont National Parks (section 32) and would only require slight legislative amendment to include other parks.

To satisfy Ngai Tahu economic aspirations the Government has considerable assets in the form of SOE's to consider as forms of settlement, if it wishes, without jeopardising the founding precepts of our national parks, reserves and conservation areas.

Due to the trust under which they are held, public estate such as our parks and reserves require greater protection from claimants than replaceable assets held by government.

In general, loss of public benefit from disposal of government commercial enterprises would be shared more equitably across the community. They are also capable of re-creation in the future if a government so desired. In any event government has stated its intention to dispose of SOE's to the private sector. It is therefore mainly a matter of which private interests end up with ownership or shareholdings, and the monetary returns government wishes to receive. Landcorp and Forestcorp land holdings have the potential to satisfy in whole or in part many claims. Government could also purchase private land on the open market to meet its obligations to Maori claimants, or to provide cash settlements for claimants to purchase private land if they so wish.

Unlike Government's assurances to private land owners that private land is sacrosanct, no such assurances have been obtained from Government that it has binding obligations to protect conservation lands. Both the Ministers of Justice and Conservation have refused to give any assurance that Parks are sacrosanct, or that the pernicious Section 436 of the Maori Affairs Act, which overrides all other legislation (see 'Conservation Areas'), will not be used to ram through any settlement of land claims.

National Parks

National parks are an internationally recognised concept that depend, with only a few exceptions overseas, on public ownership of outstanding natural lands, and administration by the highest competent national authority.

As Bing Lucas, former NZ Director-General of Lands observed in 1971—

> "The national park idea, both world-wide and in New Zealand, was born out of a conflict situation; conflict between use of outstanding natural areas for private profit or their reservation for public use and enjoyment" (P.H.C. Lucas in 'The origins and structure of national parks in New Zealand. Department of Lands and Survey, 1971).

Lucas also observed that—

> "as at Yellowstone [the world's first national park established on 1 March 1872], it was concern at possible conflict between private use and reservation of land that led to the establishment of Tongariro as New Zealand's first national park."

Te Heuheu Tukino, paramount chief of the Ngai Tuwharetoa, gifted a core area of 6518 acres to the Crown in 1887 for a national park. In the words of his adviser, Lawrence Grace, the area should remain tapu from private hands, "...a tapu place of the Crown, a sacred place under the mana of the Queen...to be the property of all the people of New Zealand."

> **"Freedom of access to national parks is a cardinal principal of New Zealand park administration**...[the parks] serve as sanctuaries for native bird and plant life and provide man with recreation and inspiration, [and] are a trust we hold for posterity" (R. J. MacLachlan, Chairman National Parks Authority in 'National Parks of New Zealand.' Government Printer, Wellington. 1974).

Most of the outstanding system of national parks we have today, being the envy of many other nations, is the result of decades of unceasing effort and pressure on Governments by conservation and recreation groups and individuals. What we now have was not easily won against the ever assertive forces of private interest and exploitation.

The present National Parks Act embodies the twin concepts of preservation and public use (see Appendix Three). The formula struck is the result of decades of democratic process that should not be lightly discarded or made inoperable by the creation of private interests with proprietary interests over the parks.

The principles of preservation in perpetuity, and preservation of 'intrinsic values' (value in and of itself), have been increasingly advanced in legislation since the 1950's. The concepts are now embodied in the Reserves, Conservation, Environment, and Resource Management Acts, as well as the National Parks Act. This reflects New Zealand's growing ethical field of view to the environment in contrast to what has historically applied. Exploitive or utilitarian views based solely on cultural outlooks that only humans and their material needs have intrinsic value, have, in these special places at least, lost legislative prominence.

Our national parks have long been very special places to our nation. Their survival dictates that they require the retention of the highest degree of protection from human avariceness and political amnesia.

ACTION BOX

Write to Jim Bolger, Prime Minister
Doug Graham, Minister of Justice
Denis Marshall, Minister of Conservation—

- Give them an emphatic NO to any private ownership, title, or joint title over our national parks.
- Say why full public ownership and control must be retained.

Conservation Areas

Last year a precedent was established for the transfer of Conservation Areas into private ownership. This involved 5000 hectares of Raukumara Forest Park on the flanks of the East Capes' Mount Hikurangi which was transferred to Ngati Porou. The handing over of ownership did not arise from either a Waitangi Tribunal recommendation or because the land had been wrongly acquired by the Crown. The transfer was made to restore the mana of Ngati Porou.

Public objection requirements for land disposals under the Conservation Act were by-passed by use of section 436 of the Maori Affairs Act 1953, which apparently overrides all other statutes including the National Parks Act.

Section 436 stipulates that land acquired by the Crown for a public purpose may be revested in Maori owners when it is no longer required for that purpose. In this case the Ministers of Forests and Conservation were satisfied that covenants, easements, and a Walkway registered on a freehold title would provide greater 'conservation benefit' than continuing public ownership and control. Covenanted areas are managed by a joint Ngati Porou/DOC committee with no public involvement and no oversight from the East Coast Conservation Board. It is now claimed that the Maori owners have rejected the covenant provisions and are not allowing the public on the mountain (Southland Times 22/7/92).

Unfortunately **covenants** and **easements** lack security for the conservation or public access purposes for which they are established. They can be varied or extinguished at any time, without any provisions for public notification or objection (see 'Covenants lack security'). **Walkways** can be closed to the public at any time at the request of the landowner. **These mechanisms are no substitute for direct public ownership and control over land that the Crown has either retained or acquired ownership for public purposes.**

Commercial pressures

Increasing financial restraints and Government under-funding has forced DOC in to revenue generation from the conservation estate as a means of paying for essential operations. This has now become big business for DOC. It has created a conflict of interest for DOC as grantor of such activities, being recipient of concession fees from private operators, as well as the official protector of the natural resource.

The dualism of 'commercial player' and land guardian has been latched on to by private commercial interests who are strenuously lobbying Government to leave the money-making to them. Existing public facilities of huts and tracks are being coveted (ODT 28/7/92). These have already been paid for from the public purse. **The Routeburn Track and other 'Premier Tracks' are the most attractive for private takeovers. If private interests are made responsible for track maintenance there is immediate scope under the Conservation Act to charge the public for use of these.** Only DOC is precluded under the Conservation Act from charging for the use of tracks and paths (section 17). The principle of access to and use of conservation areas being free of charge and therefore freely available to all, has become extremely vulnerable under this commercial onslaught.

Private commercial interests have also mooted pushing the Mount Cook National Park boundary up to the Mueller Range and selling the Hermitage area, on a freehold basis, to commercial interests (ODT 17/6/92). Such areas would therefore become exempted from any national park restraints on development and liable to great changes to its physical and social character; being detrimental to national park values.

DOC's 'Draft Strategy for Managing Tourism' ventures beyond its statutory mandate (as confirmed by Crown Law Office opinion) of 'allowing' tourism, into what can be construed as encouraging tourism by giving weight to tourism while ignoring its duty to 'foster' recreation. With restrictions on overall use in sight, and prospects of rationing by entry systems, it is apparent that DOC's **encouragement** of commercial enterprises in parks will be at the expense of future availability for the non-commercial recreationalist.

In that supposed bastion of private enterprise, the USA, our Minister of Conservation last year recorded his observations of a very different trend in park management—

> "One of the interesting trends in US park management is the current strengthening in public policy, and the reinforcement of the federal government's role in running the parks process. There was no talk of privatisation, and they seem to be much tougher on the private sector than we are...the fact that [a business opportunity] may be a good business idea and a chance to make money does not determine the outcome" (Hon. Denis Marshall. Terra Nova. August 1991).

ACTION BOX

Write to Denis Marshall, Minister of Conservation asking—

- That section 436 Maori Affairs Act not be used to transfer conservation lands.
- For assurance that public objection and disposal provisions of the Conservation, Reserves, and National Parks Acts will continue to apply to all land disposals and transfers.
- That he directs DOC to fulfill its duty to 'foster' recreation and no more than 'allow' tourism.
- That all income from the conservation estate go into the Consolidated Fund, and all of DOC's operations be funded from 'Vote: Conservation'.
- That no commercial interests be permitted to operate walking tracks or public huts on conservation lands.

Pastoral high country

Approximately 3 million hectares of Crown land along the eastern margin of the South Island's Alps are currently leased out by the Government for grazing. This 'run country' stretches from Marlborough to northern Southland and is predominantly mountainous. **This is the largest remaining category of Crown-owned land left, comprising some ten per cent of New Zealand.**

The granting of rights of pastoral occupation date back to the 1850's. Such lands were officially regarded as 'waste lands' because of their unsuitability for agricultural uses and their marginal value for pastoralism. No other attributes for public purposes were then recognised.

Severe limitations of climate, altitude, soil, and susceptibility to erosion were recognised as requiring continual control over land use through Crown ownership of the land. In recognition of these limitations, runholders are charged very low rentals by market standards. Today's pastoral leases give exclusive occupancy (i.e., trespass rights) for the sole purpose of grazing. They are for terms of 33 years with perpetual rights of renewal. There are no rights to cultivate, diversify into other land uses, or to freehold. The lessee owns the improvements to the land, but the Crown retains the natural attributes of the land itself. The Crown also retains the right to authorise other uses and tenures after a process of reclassification. There is also the power to compulsorily set aside public reserves, but it is unknown for the Crown to have done so. Consequently **there is almost a total absence of reserves to which the public have rights of use.**

The outstanding natural and recreational character of much of the high country has more recently been recognised in Government policies over the last 15 years, and by targeting the region for attention under the Protected Natural Areas Programme. Landscapes are incredibly diverse, ranging from glaciers to herbfields, tall and short tussock grasslands, arid basins, gorges, braided rivers, and wetlands. Such settings provide a diverse range of opportunities for public recreation that are not necessarily provided for in our existing parks and reserves.

Public recreational use has been made of these lands for decades, at the pleasure of the runholders. However rapidly growing realisation of the commercial potential for nature and adventure tourism is now directly threatening its availability for public use. Rather than just being content to continue allowing informal public recreation or to charge solely for services and facilities, runholder-developers are now capitalising on publicly owned resources. Fish, game animals, and snow are effectively being privatised through runholder control over access. Because they hold trespass rights they can effectively control or prohibit all non-pastoral users and uses of the land. Thousands of dollars are now charged for trophy wild animals, or daily charges made as 'field fees' which contain hidden charges just for being on the land. Extension of such approaches is being actively promoted by runholder interests wanting to capitalise as of right on all potentially commercial values. This is in part prompted by a growing realisation that the high country pastoral industry is at the brink of collapse due to land degradation.

Land degradation

Widespread degradation is evidenced by plummeting stock numbers, recurring explosions in rabbit numbers, general decline in the quality of the tussock grasslands, desertification of the more arid basins, and the spread of invasive weeds. New Zealand's leading high country farming researcher recently concluded that the Mackenzie Basin is one of the worst examples of land degradation in the world (Chris Kerr, pers. comm. 12 August 1992) and that there is a seemingly relentless and accelerating decline in pastoral production over all tussock grasslands (I.G.C. Kerr. 1992. The high country in transition — some implications for occupiers and administrators. Review 49). Numerous commissions of inquiry over the decades have pointed out the fact that the above problems are merely symptoms of the underlying cause—150 years of repeated burning and grazing.

Runholder responses to concerns about degradation have been to label the symptoms as the causes. They have applied for the introduction of myxomatosis to deal with rabbits, and blame external causes such as ozone depletion, and even meteors for the spread of hawkweeds! This is rather than recognise the readily apparent degradation attributable to pastoral use. One only has to regularly visit many areas of formerly vigorous tussock to witness its transition to stumble, bare ground and weeds under the onslaught of excessive grazing and too frequent burning. Wetland drainage and the loss of stream bank stability through stock presence is also widespread. **The enormity of the changes being wrought on the high country is openly acknowledged by everyone.** Scientists have been making dire warnings about damage to the tussock grassland system for the last 125 years.

> "Unfortunately, in the high country farming on the basis of good business practice (annual balancing the financial book) results in unacceptable resource depletion. These are the classic conflicts between short term, private objectives and long term, societal objectives; and between tangible financial measures of production and intangible environmental qualities and their maintenance...as long as private, sectorial interests dominate the discussion surrounding the management of the the South Island high country the opportunities to develop more sensitive uses of the fragile resource will not occur. That the public has a major stake in the sustainability of the high country resource is implicit in the tenure of the land" (Fraser McRae. Otago Regional Council. 1991. Issues in the High Country: Towards Sustainable Management. International Conference on Sustainable Land Use, Napier).

The consequences of land degradation, additional to major loss of productive potential, are that the value of the high country for nature conservation is being rapidly diminished and its attractiveness for public recreation impaired.

Excessive security of tenure

Due to the strong security of tenure provided by pastoral leases, disproportionate political influence relative to numbers (only 360 runholders), and a succession of weak Government administrations, the pastoral high country in now in crisis. The poor performance of the Crown can in large part be attributed to the overly strong and exclusive occupation rights provided to runholders under the Land Act 1948. Because the property rights created are so strong, although limited in purpose, Governments have avoided intervention despite overwhelming evidence of land degradation or other abuses.

The last time Government intervened in a substantial manner was when the present Act replaced its predecessor. In retrospect Government mistakenly increased pastoralists' rights of occupancy in the belief that greater security would induce greater personal responsibility for good husbandry of the land. Some improvement in the condition of 1950's rabbit-depleted areas occurred under the new tenure. However the overall trend of depletion continued despite retaining nominal controls over stock limitations, burning, and earth disturbance. The absence of explicit conservation principles for the Act created a bias for production ahead of all other interests. Short-term private interests have been permitted to prevail to the extent that repeated breaches of the conditions of the leases are tolerated, and even obtain retrospective approval. The absence of a scale of penalties to-fit-the-crime, rather than sole reliance on forfeiture of a lease has not helped. Such deficiencies could be rectified in a revised Land Act, to cover the areas still fit for continued grazing.

There is a general consensus within officialdom that pastoral leases cannot cope with present-day needs. **Reform of land use by reallocation to conservation, recreation, and sustainable primary production is now essential. This has proved impossible under the legal stranglehold created by the present tenure.**

Categorisation

Until very recently, successive Governments have been committed to using the reclassification (also known as categorisation) process under the Land Act to reevaluate the capability of the land and to change its use and tenure. Under the Land Act tenure cannot be changed without changes to classification. Up to three categories have been officially promoted—

- **conservation lands**, for instance alpine tops and grasslands unsuitable for grazing, wetlands, and representative natural areas;
- **improved farmland** at lower altitudes that no longer requires direct Crown oversight and may have potential for more intensive uses;
- extensive tussock grasslands that are predominantly natural and may be able to sustain **restricted grazing.**

An additional category should be created for seriously degraded lands, to revert back to Crown control for the long-term rehabilitation of productive potential. As the Crown has allowed the degradation of its own estate, **rehabilitation should be a full Crown responsibility. This must not be a role for DOC,** being the state custodian of natural lands for purposes other than production.

The process of categorisation envisages an exchange of rights and lands between the Crown and its tenants so that the changes necessary are affordable or equitable to all parties. Conservation lands would go to DOC, the farmland would be offered for sale to the existing tenants as freehold, and the restricted use category offered on new 'designer' leases with conditions allowing greater control over grazing practices. **Public accessways would be provided where required as part of the deals.** In effect, lessee interest in the Crown lands would be deducted from the cost of them purchasing the Crown's interest in the 'farmland'.

Categorisation would be preceded by assessment of natural and recreational values in the public arena, a major advance on the present situation, with the tenure negotiations confined to the directly affected parties. The latter is in recognition of the contractual relationship between the Crown and lessees. These proposals have been on the books for the last six years with draughting instructions for a Land Bill already prepared and waiting in the wings for the Government's nod. The proposals were drafted in consultation with runholder, conservation, and recreation interests.

Recent runholder responses to calls for change have been demands for even **greater** security of tenure including freehold over everything. However not all runholders want freehold as they would prefer to avoid greater indebtedness, or would prefer to invest in development rather than land purchase.

The demise of the Crown?

In a remarkable turn-around in a matter of a few months, officials are now proposing that the Crown get out of lease control altogether. There have been discussions with Federated Farmers to discuss freehold over all the land with **commercial** value i.e., greater than just grazing value (ODT 9/6/92). A freehold option has been mooted with provision for public access and recreation via covenants registered against the titles.

Despite the Resource Management Act being new and largely untested this is now seen as the political cure-all for all conservation management and an opportunity to pass the forever thorny high country problem on to regional councils. Such an approach ignores the fact that well-founded conservation objections to the burning of sub-alpine tussock have already been disallowed. The provisions of the Resource Management Act are " too generalised, woolly, and confused" for promoting sustainable management (Guy Salmon, ODT 13/5/92).

Nature conservation and recreation requirements are different from those of the (managed use, development and protection) 'sustainable management' principle behind that Act. **Extending the officials' rationale that the Resource Management Act can adequately manage all lands whether in primary production or reserved for public purposes, the whole conservation estate including national parks is then liable to lose its special protective status.**

The high country debate is essentially a power struggle between the current land holders and the public interest. The former wish to retain the status quo, have minimum state regulation of their activities, and gain additional exclusive rights to diversify into opportunities other than farming. Lengthy public debate indicates that the public most want protection of the remaining natural environment and unhindered access to such areas without payment for the privilege. Not every conservation group agrees. Maruia Society's Director Guy Salmon believes that—

> "the State needs to bow out of much its present role to produce a new flexibility in high country solutions, making scope for the dynamism and innovative capacity of the market...market forces would operate in the high country...important opportunities lie in horticulture, viticulture, orcharding, sale of lifestyle properties to foreigners, ski and recreation resorts, and forestry" (Maruia Society National Executive Memo, 7 May 1992).

Mr. Salmon makes no provision for unhindered rights of public access and enjoyment, this being at some variance to his advocacy of "a more moral and human face to New Zealand environmentalism" and his strong belief "that environmentalists need to have a very compelling understanding about what it is to be a human being" (Terra Nova, Feb. 1991).

ACTION BOX

Write to Rob Storey, Minister of Lands—

- Saying YES to reform of the Land Act to provide for categorisation of pastoral leases into conservation, farming, restricted use, and rehabilitation lands.
- Saying YES to continuing active Crown involvement as landlord over pastoral leasehold.
- Saying NO to additional development rights being given to runholders prior to categorisation.
- Saying NO to any further freeholding on individual leases until categorisation is completed.
- Saying NO to access covenants over pastoral leases rather than publicly-owned accessways.
- Saying NO to conservation covenants rather than public reserves.

Government Purchases Greenstone and Elfin Bay Stations

In the first of its kind, Government has purchased the lessees' interests in two adjoining pastoral leases on the shores of Lake Wakatipu near Queenstown. The purchases were at the request of the Ngai Tahu Maori Trust Board to be used for negotiation of settlement of their land claims. 'Top end' market prices were paid which included 'environmental values' (ODT 17/9/92).

The runs cover 29,000 hectares of highly scenic valley floors in the Greenstone, Caples, and Mararoa valleys and alpine tops in the Ailsa and Humboldt Mountains. They adjoin the Fiordland National Park, Mavora Lakes Park, and conservation forests managed as a Recreational Hunting Area. The runs intersect conservation areas, which hold World Heritage Park status.

When the runs first came on to the market, DOC assessed their suitability for addition to the conservation estate. The department concluded that grazing conflicted with nature conservation and that the areas have national and international importance for conservation and recreation. For instance the Greenstone River was assessed as providing a highly valued rainbow trout fishery **on a World scale.**

The nationally renowned Greenstone walking track traverses leasehold without formal protection as does a Walkway to the Mavora Lakes. The DOC report also noted restrictions of access to the RHA due to consents being necessary to cross leasehold. It also identified 3700 hectares of alpine land retired from grazing. Retirement was under government subsidy but the area was retained in the leasehold title despite requirements for surrender to the Crown (Otago Catchment Board Retired Lands Summary, August 1986). It therefore appears that the Crown has paid the outgoing lessee twice for this land.

While Government has not disclosed if there is any commitment to hand title to Ngai Tahu, the Trust Board has entered into a joint venture for potentially the biggest tourist project in New Zealand. This is for a $80 million mono-rail up the Greenstone valley to Milford Sound. This would traverse both pastoral lease and national park. There are huge potential impacts both on-site, and off-site for an already overstretched Milford Sound. There are hints of other tourist developments in the Greenstone and Caples valleys and an intention to increase grazing in the sensitive Mararoa catchment.

Government responses to public alarm at these proposals have been that in negotiating the Ngai Tahu claim government will not contemplate the erosion of existing public access. However this does nothing to address the trespass rights held by the outgoing lessees. As already noted there are no rights of public use over the Greenstone and Caples tracks, the Mavora Walkway, and the balance of the areas liable to disposal to the Ngai Tahu Trust.

No assurances have been made that freehold title will not be offered, or has not already been offered, to Ngai Tahu over the full extent of the former leases. As vacant Crown land there is no legal impediment to disposal by the Government in any tenure it chooses. Ngai Tahu have an 'expectation' that they will receive freehold title (Mr. C. Rennie Ngai Tahu Communications and Public Relations Consultant, Adipose Fin, Issue 24, July 1992).

The Greenstone purchases have the potential to signal the mass disposal and sell-off of the South Island high country to private interests. If Government deems freehold ownership to be appropriate to such areas of outstanding public value, nothing else is safe.

ACTION BOX

Write to Ministers of Justice and Lands saying—

- An emphatic NO to any freeholding of pastoral leases acquired for settlement of Ngai Tahu claim, unless prior **public** categorisation process, and all conservation/recreation areas added to public estate.
- Only areas of high farming value be offered as freehold and all walking tracks legally protected.

Other freehold deals in the wind

Requests from runholders, proposals to implement the PNA Programme, and MAF's Rabbit and Land Management Programme, are giving rise to a growing number of freehold deals over pastoral lease. The absence of reforms to the Land Act and government stalling on categorisation is giving rise to piecemeal freeholding of the most productive lands. This is usually without the reservation of all the lands deserving conservation management or the provision of public rights of access.

As DOC attempts to negotiate the protection of areas identified under the PNA Programme, usually without comprehensive assessment of all natural values and public recreation needs, these latter matters have tended to be deferred. The result has been at best, scenic reserves without **rights** of public rights of access (e.g., Lauder Station, Dunstan Mountains) or covenants that avoid pressing tenure and public access issues. There are now proposals being actively investigated for a special kind of freehold over the top of the Pisa Range in Central Otago where the primary use is cross country skiing rather than grazing. Conservation, and presumably public access, needs are to be accommodated by covenants. Officials appear to be dreaming up ways of getting out of government administration of pastoral leases with little thought as to the practical consequences of doing so.

While it can be argued that DOC's efforts are an improvement on the protection available under leasehold, this piecemeal approach is reducing the Crown's future ability to rationalise both tenure and land use. Once the most productive land is freeholded, the Crown will be left with little or nothing of high market value as a tradeoff to runholders in compensation for exclusion of all areas of significant nature conservation or recreation value from leases. Equitable exchange of interests, as envisaged under the categorisation process, will become impossible unless the Crown resorts to monetary settlements. When the Crown claims to be strapped for cash this seems a most unlikely event. There are approximately 10-12 freehold deals now in the pipeline.

Comprehensive property-by-property settlements are necessary. The Government should stop stalling on categorisation and changes to the Land Act.

ACTION BOX

Write to Rob Storey, Minister of Lands asking—

- That there be no selective freeholding of pastoral leases unless whole-property categorisation takes place.
- That he not approve any DOC reserves unless they are provided with convenient, guaranteed public access strips.

Write to Denis Marshall, Minister of Conservation asking—

- That DOC does not enter into any further conservation covenants over pastoral leases.

Non-surrender of destocked lands

Last year a review of all former catchment board arrangements for the destocking and surrender of alpine areas of pastoral lease was conducted for the Public Lands Coalition (Review of Destocking and Surrender of Alpine Crown Lands in the South Island High Country. Bruce Mason. May 1991). The arrangements reviewed were Land Improvement Agreements between runholders and boards. These provide, in exchange for government grants and the provision of fencing and alternative grazing, for alpine areas to be destocked and surrendered to the Crown.

The review found that over 200,000 hectares have been retained in leasehold despite commitments for permanent destocking. Another 170,000 hectares were put into short-term licences, without rights of renewal. However several of these areas, contrary to government policy, have been re-incorporated into pastoral lease with perpetual rights of renewal.

Another 95,000 hectares were found to be still in leasehold despite commitments to destock and surrender and the terms of the agreements being complete. **Of the $5 million of Government subsidies spent on destocking and surrender agreements only $2 million worth has been seen through to actual surrender of the land.** This leaves $3 million of taxpayer inputs not honoured by either runholders or the authorities.

Most of the agreements were between catchment boards and individual runholders, without the Crown as landlord being a signatory. The Otago Regional Council, as successor to the Otago Catchment Board, is now citing this omission as the reason for not enforcing surrender provisions. However this does not appear to be a major problem elsewhere. Even in the absence of the Crown as party to the agreements it is entirely within the prerogative of the Regional Council to enforce its own legal agreements.

Almost 30,000 hectares of Otago high country, including for example part of the famous **Mt Nicholas Station** next door to Elfin Bay, have been kept in the leases. The lessee of Mt Nicholas, despite having received $193,000 in government grants for completion of the agreement, has retained 4,900 hectares of destocked and fenced-off mountain tops (OCB Retired Lands Analysis 1985). While these lands remain in the lease the lessee retains trespass rights and an exclusive opportunity to initiate commercial ventures, as well as retaining the ability to exclude the public.

ACTION BOX

Write to Rob Storey, Minister of Lands asking—

- That he request all regional councils to arrange immediate surrender of pastoral lease where there are commitments for surrender of destocked areas (if you want a list of areas contact Public Access NZ).
- That the Minister resumes such areas (section 117 Land Act) from the leases if runholders fail to sign surrender documents by the end of 1992.

The 'Queen's Chain'

New Zealand is internationally admired for the foresight in ensuring that public access to and along most of our waterways is provided for by what is colloquially known as the 'Queen's Chain.' Many countries are not so fortunate, resulting in great social inequality, and great expense on the part of governments attempting to improve public access through purchase of private land.

The 'Queen's Chain' takes its name from the nominal one chain (20 metre) width of the reservations and from Queen Victoria's instructions to reserve land in public ownership near the seacoast or navigatable streams (see Appendix Two). The 'Queen's Chain' is comprised of segments of marginal strip, public road, and esplanade reserve. These provide public rights of access over approximately 70% of our shores. The strips are normally established at the time of the Crown disposing of adjoining lands to private interests.

The essence of the Queen's Chain concept is reservation of public ownership for public use. Over the last few years these founding tenets have been subjected to Government-initiated attack, and the attacks continue.

The concept gained particular prominence in 1989-90 when the Labour Government initiated 'reforms' to the marginal strip provisions of the Conservation Act. For the first time we saw proposals for disposal of strips and for wide exemptions from their establishment. Notions of closure at the whim of adjoining owners, and the concept of private 'managers' holding development rights were introduced. Public outrage ensured that the worst aspects of the then Government's plans were dropped. However the stage is now set for the alienation of control to private persons for private purposes— a fundamental change to the Queen's Chain concept.

Esplanade reserve changes

The present Government has its own designs on the Queen's Chain. It is not surprising that demands from Federated Farmers to water down the requirements for esplanade reserves under the Resource Management Act have been favourably received by the National Government. Rob Storey, now Minister for the Environment, but Opposition Spokesperson for the Environment at the time of the last great 'Queen's Chain Debate,' wondered then if it was necessary to have Ministerial restrictions on private managers of strips.

Mr. Storey stated during the Conservation Law Reform Bill debate that he never had any great problem with preventing access to strips—

> "The Minister (of Conservation) has over-reacted to the extent that people can be prohibited from going along a marginal strip only if he has approved it. That restriction is nonsense...the Opposition would not be prepared to support it" (a full profile of Mr. Storey's statements in Parliament concerning marginal strips is available from Public Access New Zealand).

The Resource Management Act 1990 heralded the prospect of major improvements to public access to waterbodies. It made "the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers" a matter of national importance. The Act more specifically extended into rural areas existing esplanade reserve provisions under the Local Government Act. Since 1921 these reserves have been required to be laid off along the margins of waterbodies when urban areas are subdivided. They were also been required in rural areas after 1946. **These 'reserves contributions' are the traditional means of subdividers-developers compensating the community for loss of amenity values and for the creation of demand for services from local authorities.**

Before the full provisions for creating reserves under the

new Act had been tested (it is still in a transitional phase with the old rules still applying), Government now claims that the new provisions are not working. Using arguments reminiscent of the last government's in relation to marginal strips, Mr. Storey advances several reasons for changes to the Act. These include allegedly high survey costs, and the lack of movability of the reserves. The Conservation Act already provides a model for movable publicly-owned marginal strips involving minimal survey costs. This could equally apply to esplanade reserves if the Government so wished.

It is also argued that there are substantial weed management costs for local authorities, and that farm management is unduly disrupted by public access. No substantiation of such claims has been provided, just bold assertion. Such arguments are classic anti-public ownership ploys and were also prominent during 1989-90 marginal strip debate. Mr. Storey also claims that people don't know where the reserves are, as a justification for doing away with them, but makes no greater provisions for public knowledge of his 'reserve alternatives' (see below).

It is also argued by the Minister that existing reserves are fragmented and will take a long time to obtain continuous coverage (i.e., that subdivision is a poor trigger for establishment). This is his central justification for changing the Act.

Government intends to only require reserves where 'high' conservation or access values are present, but, in a reversal of previous principles, the local authorities will be obliged to pay full compensation to the landowner. **With new broad discretions available to local authorities to avoid land acquisition it will signal the end of further public reserves beside watercourses. The proposals will result in greater fragmentation, not less.**

As alternatives to reserves the Government proposes 'esplanade covenants'. Local authorities would also be encouraged to negotiate 'public (pedestrian) accessways'.

Mr. Storey's central thesis is that subdivision is a poor trigger for reserve establishment, however his proposals provide no other triggers. Local authorities have had the ability to negotiate public rights of way since day one of settlement but most have initiated such action rarely if ever. If there are no obligatory consents that require the establishment of public access, by whatever means, it is most unlikely that the authorities will take initiatives. It is almost unknown for a private landowner to do so.

Access covenants and accessways, besides lacking the security of public reservation, will add nothing to the state's ability to improve public access to water bodies. The reverse appears to be the intent, as **it is proposed to create general powers of closure, as well as specific prohibitions for those carrying guns or with dogs.** The latter access needs are essential for game hunters.

The importance that the government attaches to public access is perhaps summed up by Mr. Storey's woefully out-of-touch statement to Federated Farmers this year—

> "...whatever the system, it is important to remember that only a relatively small number of people want access to waterbodies for activities such as walking and fishing" (Hon. Rob Storey. Speech to Dairy Section, Federated Farmers. 20/2/92).

Public Access New Zealand cannot see that anything has changed so dramatically that warrants abandonment of the public reserves concept in favour of continuing private ownership of sea, lake and river margins.

ACTION BOX

Changes to the Act are due to be introduced to Parliament within the next few weeks. The Campaign intends to produce a detailed analysis of the Bill and suggest practical alternatives to assist anyone wishing to make submissions or to raise the issue in the news media. **If you would like to receive a copy please advise the campaign.** Make this a media issue now.

AFTER THE ACTION

Please send us copies of Ministerial and MP's replies, and newspaper coverage from outside the Otago area. We need to know how the politicians are behaving under the pressure and to keep everyone informed.

Appendices

Appendix One

The Institutes of Justinian.

Emperor of the East 483?-565 A.D.

English translation by Thomas Collett Sanders

"In the preceding book we have treated of the law of persons. Let us now speak of things, which either are in our patrimony, or not in our patrimony. For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals, who acquire them in different ways, as will appear hereafter.

1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.

2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.

3. The sea-shore extends to the limit reached by the greatest winter flood.

4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself...

5. The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself; and therefore any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shore may be said to be the property of no man, but are subject to the same law as the sea itself, and the ground or sand beneath it."
(Thomas Collett Sanders. 1956. The Institutes of Justinian. Longmans, Green & Co, London).

Appendix Two

INSTRUCTIONS.
VICTORIA R.

INSTRUCTIONS to our trusty and well-beloved William Hobson, Esq. our Governor and Commander-in-Chief in and over Our Colony of New Zealand, or in his absence to Our Lieutenant-governor, or the officer administrating the Government of the said Colony for the time being.—Given at our Court at Buckingham Palace, the 5th day of December 1840, in the Fourth year of our Reign.

43. And it is our pleasure, and we do further direct you to require and authorize the said surveyor-general further to report to you what particular lands it may be proper to reserve in each county, hundred, and parish, so to be surveyed by him as aforesaid, for public roads and other internal communications, whether by land or water, or as the sites of towns, villages, churches, school-houses, or parsonage-houses, or as places for the interment of the dead, or as places for the future extension of any existing towns or villages, or as places fit to be set apart for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants, or as the sites of quays or landing-places which it may at any future time be expedient to erect, form, or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment; and you are specially to require the said surveyor-general to specify in his reports, and to distinguish in the charts or maps to be subjoined to those reports, such tracts, pieces, or parcels of land in each county, hundred, and parish within our said colony as may appear to him best adapted to answer and promote the several public purposes before mentioned; and it is our will and pleasure, and we do strictly enjoin and require you, that you do 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.

56. And we do further declare our pleasure to be that, anything hereinbefore contained to the contrary notwithstanding, no land shall be sold in any part of the said colony of New Zealand, which the said surveyor-general may report to you as proper to be reserved for any of the several public uses hereinbefore mentioned.

Irish University Press. Series of British Parliamentary Papers. Colonies: New Zealand. 3. 1835-42, pp 156-164.

Appendix Three

National Parks Act 1980
Principles to be applied in National Parks

4. Parks to be maintained in natural state, and public to have right of entry—(1) It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.

(2) It is hereby further declared that, having regard to the general purposes specified in subsection (1) of this section, national parks shall be so administered and maintained under the provisions of this Act that—

(a) They should be preserved as far as possible in their natural state:

(b) Except where the Authority otherwise determines, the native plants and animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be exterminated:

(c) Sites and objects of archaeological and historical interest shall as far as possible be preserved.

(d) Their value as soil, water, and forest conservation shall be maintained:

(e) Subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the native plants and the animals or for the welfare in general of the parks, the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.

Appendix Four

Tribunal rulings on Ngai Tahu claims

Hugh Barr

Reprinted from FMC Bulletin Number 109, March 1992

Most members will be aware that the Ngai Tahu have been pursuing land and other claims involving seven eighths of the South Island through the Waitangi Tribunal. The Tribunal delivered its decision on these claims in February, 1991. FMC presented submissions on behalf of recreational users as set out in the September 1989 FMC Bulletin.

The Tribunal's decisions were for the most part measured and well reasoned. It recommended "large and generous" compensation for the Crown having left the Ngai Tahu "largely landless and impoverished," (since) the 187O's. The nature of compensation was left to negotiation between the tribe and the Crown. In June Ngai Tahu and the Crown commenced negotiations on compensation for their grievances. These negotiations have to date addressed some of the smaller claims.

There have been some wild statements made about the claims. Perhaps the most outrageous was by former National Maori Affairs minister Winston Peters who, when the report was released, said he would be happy to see some of the South Island's national parks vested in Ngai Tahu. Since then he has been sacked as minister, but not for this reason.

The Ngai Tahu did not ask for vesting of national parks in them as part of their grievances, and so the Tribunal rulings do not directly address such issues. However there appears a body of opinion that sees this type of approach as a cheap option for the Crown. To dispel these views, and inform members of the nature of the Tribunal's rulings, we summarise the claim and relevant findings.

The Claims

These were made up of eight main claims concerning lands acquired by the Crown from Ngai Tahu between 1844 and 1864. A major claim concerned failure to provide for mahinga kai (places where food is gathered) and a number of smaller claims. The areas of the eight main land claims are shown on the map. The nine major claims involved 73 specific grievances on which the Tribunal ruled.

Two of these grievances concerned whether two major areas that are now predominantly public conservation land were in fact sold. These were (a) land west of the Waiau River in Southland—now predominantly Fiordland National Park and (b) the "hole in the middle" —from the east coast plains to the Southern Alps Main Divide, in the Kemp purchase. The Tribunal found that both these areas had indeed been legally purchased by the Crown. Therefore in terms of settlement of the claims, this land ranks equal with other lands, something that may not have been the case if it had not been legally purchased.

The claims involving significant conservation lands are:

Kemp Purchase: This was by far the largest acquisition, 20 million acres, or one third of New Zealand. It was also the most controversial, with the Crown paying a mere £2000, and reserving only 6400 acres or just under 10 acres per person for Ngai Tahu needs. Ngai Tahu registered eleven grievances on this purchase. Their main concern was that the Crown failed to provide ample reserves for their present and future needs, and that mahinga kai were not reserved. They wanted the block between the Kowhai and Waimakariri Rivers reserved, and also a right of way across what is now Arthur's Pass, or thereabouts to the West Coast. They also disputed the boundaries of the purchase. Ngai Tahu claim they agreed to sell only the Plains, that Lake Ellesmere, an eeling lake, was excluded, and that, although Europeans were granted pastoral lands under land settlement acts, Ngai Tahu were not.

The purchase was originally discussed by Grey, and then negotiated in detail by Kemp. Although Kemp was instructed by Grey to identify and survey all land reserved from sale, he did not do so, although making several promises. He was then replaced by Walter Mantell, who was not present at the agreement stage. He narrowly interpreted what was to be reserved, substantially reduced the reserves and did not recognise mahinga kai. This outcome was approved by Grey, and Mantell was rewarded for it.

The Tribunal upheld the grievance that the Crown failed to provide the adequate reserves Kemp had agreed to, for Ngai Tahu's current and future needs or for mahinga kai. The Tribunal also found that the reserves did not allow them to develop an economic base in pastoral farming. In fact, Grey and Mantell appeared determined not to let this happen. The Tribunal did not agree however that the boundaries were substantially wrong or that the "hole in the middle" had not been purchased.

The Tribunal also considered that a number of small additional Crown settlements, including paying £30,000/year to Ngai Tahu since 1944, had done very little to redress the very great wrong originally incurred.

Murihiku (Southland): This was a purchase of 7 million acres for £2600, with a mere 4875 acres set aside for the Ngai Tahu. Again Mantell was the Crown's negotiator.

The grievances included that reserve areas which Ngai Tahu had requested, mainly on the coast, were not set aside, and that promised schools and hospitals were not provided. The Tribunal sustained both these grievances.

North Canterbury and Kaikoura: This purchase was to extinguish Ngai Tahu rights to lands that the Crown had already sold for settlement, assuming it had bought them in a Nelson purchase from an adjacent tribe. The purchases were of 3.8 million acres for £800, with less than 6000 acres set aside. Good grazing land was selling at 10 shillings per acre at the time. The Tribunal found Ngai Tahu had never been adequately compensated, and had been coerced. In the case of the Kaikoura purchase, a request to set aside 100,000 acres around the Conway River as reserve was turned down by the negotiator, James MacKay. The Tribunal found that inadequate reserves had been set aside.

Arahura (Westland): This was a purchase the Crown believed it had already made, either through the Kemp purchase or from the Nelson-based Ngati Toa tribe. James MacKay, the negotiator was instructed to settle for no more than 500 acres for reserves, and pay no more than £200, the "price of a horse", for the 7 million acres. He persuaded the Crown to lift its bid to 12,000 acres of reserves and £300. Ngai Tahu originally requested 200,000 acres, between the Grey, Arnold and Hokitika rivers, and control of their prized greenstone (pounamu). Their reserves included 500 acres of land at what is now Greymouth. MacKay also gave the tribe the "right" to re-purchase back country at 10 shillings an acre, 12,000 times the price the Crown had paid them for it.

The Tribunal found the price paid was too low, and that a larger reserve should have been set aside to protect greenstone in the Arahura Valley. The Tribunal did not support the grievance that Ngai Tahu should have received its originally requested 200,000 acres of reserve. Nevertheless, it found that the original reserves allocation were quite insufficient for the future economic or social needs of the tribe. On the greenstone question, the Tribunal recommended that the Crown vest all greenstone within all blocks purchased from Ngai Tahu with them. It also recommended the Crown to purchase land on either side of the Arahura and its tributaries, to their sources, and transfer it to Ngai Tahu. It also proposed the peppercorn rentals for Greymouth land owned by Ngai Tahu should be immediately rectified.

Rakiura (Stewart Island): This was purchased for £6000. Grievances centre on the Titi Islands, a valued food resource for mutton-birds, and Codfish Island. The Tribunal agreed to vesting the Crown Titi islands with Ngai Tahu, but did not uphold the Codfish Island grievance.

Mahinga Kai: These claims centre on inadequate land provided for cultivation, and on inability to gather traditional foods such as eels, salmon, crayfish, shellfish, duck, wood pigeon and other birds. Hearings centred on the Titi Islands (already discussed), Lake Ellesmere and its associated Kaitorete Spit and Lake Forsyth. The tribunal found that pollution from settlement, forest clearance, and industry had greatly diminished mahinga kai and that, whereas settlers had benefited from this development, Ngai Tahu had suffered. It also found the Crown had failed to provide sufficient reserves to preserve mahinga kai, and recommended greater Ngai Tahu control over Lakes Ellesmere, Forsyth, and their fishery. It also recommended greater Maori involvement in environmental planning, the reduction of water pollution, and resource management through greater consultation.

Conclusions

Five points stand out from the evidence and the Tribunal's rulings.

The first is that the tribe were not left with sufficient land for a current or future economic base, and that the Crown did not protect their traditional food sources. Grey, Mantell and others drove an unfair bargain that breached Treaty principles of fairness. The Crown's acquisition of 34.5 million acres for £14,750, while leaving Ngai Tahu 35,757 acres of largely unproductive land is demonstrably unjust. Subsequent efforts by the Crown to make good Ngai Tahu's loss were few, dilatory and largely ineffective. The Tribunal concluded the tribe is clearly entitled to very substantial redress from the Crown. However it believed this redress must reflect present day realities.

The second is that the reserves the Ngai Tahu wanted set aside at the time of purchase were productive lands, such as the North Canterbury plains. They were not the low value wildlands and mountains now included in the public conservation estate. The only grievances sustained by the Tribunal that affect the public conservation estate concern the Crown Titi Islands, Lake Ellesmere, parts of the Arahura Valley, and Ngai Tahu ownership of greenstone.

The third is the recognition by the Tribunal that other legal undertakings by the Crown cannot be lightly discarded. For instance, greenstone mining licenses should be allowed to expire.

Fourth, there will be bewilderment and resentment on the part of non-Maori New Zealanders, 140 years after the event. They will be asked to pay to right these wrongs created by the British Crown over which they had no control, and from which most have not benefited.

Finally, it is apparent from the Ngai Tahu evidence that Treaty grievances have been so ingrained in Maori tribes over the 140 years of Crown procrastination, that it is unclear that anything the Crown could do would lead to reconciliation.

The full report covers some 1200 pages and is available from Brooker and Friend (P O Box 43, Wellington).

STOP PRESS

Government has purchased another pastoral lease for settlement of Ngai Tahu claims—
Routeburn Station next door to the Mount Aspiring National Park.

Publications

Send donation, and return postage (80c) to—

Public Access New Zealand,
P O Box 5805, Moray Place, Dunedin

Queen's Chain Profiles. Recorded statements (1989-90) concerning marginal strips by—

Rob Storey.
Philip Woollaston.
Jim Anderton.

Public Access along the Queen's Chain and Public Roads. Bruce Mason. Paper delivered to Backcountry Recreation 2000 Conference, Nelson. September 1991.

'The Queen's Chain'. Graham E. Anderson. (1990).

Further publications are planned on rights of public access to the Queen's Chain, lakes, rivers, and the sea.

Available from Public Lands Coalition,
P O Box 76, Dunedin for $13.95 incl. postage—

Public Roads, A Guide to Rights of Access to the Countryside. Bruce Mason. 1991.

Access News

If you would like snippets of news included in future issues please send to the Editor, Public Access New Zealand.

High Country Herald (Timaru)
26 August 1992

Road access battle is finally over

A nine-month battle to have access on a public road guaranteed has finally ended for Ruapuna fisherman Ivan McKeown.

In December last year Mr McKeown started out to drive to his favourite fishing spot along the Rangitata Terrace Road and to his surprise found a locked gate blocking access.

Although the road runs through private land and is unformed, it is a legal road with public rights of access to the road reserve area.

During the following months several padlocks on the gate fell victim to his boltcutters, he wrote numerous letters to the Ashburton District Council and even instituted an investigation by the Ombudsman's office.

However, all the arguing is finally over and Mr McKeown says he is satisfied with the result which has seen public road signs attached to all seven gates on the road and an assurance from the council to the ombudsman that the gates will remain unlocked.

While access to the road is now guaranteed and everyone is well aware that the road is open to the public, Mr McKeown says he is angry that it took so much effort on his part to have the law complied with.

"It is an absolute disgrace.

"When I rang the council on 6 December all they had to do was pick up the telephone, ring the farmer and say, this is illegal...

"He would have taken the lock off and it would have been finished."