Nature vs Marine and Coastal

Does the Law of Nature Over-Rule the Marine and Coastal Area Bill?

"By the law of nature, these things are common to all mankind–the air, running water, the sea, and consequently the shores of the sea".
Emperor Justinian 500AD.

The essence of the **Law of Nature** (Public Trust Doctrine) has existed since Roman times, and was first articulated in the laws of Emperor Justinian some 1500 years ago. In its early form, the idea of the public trust sought to protect the public's rights to access certain resources, particularly navigable bodies of water. Public uses of water resources were to be protected by the state, which, as a trustee, could not grant exclusive rights to any single individual or entity. Giving ownership or rights to an individual would infringe on the publics right to access and use the resource. The **Law of Nature** was inherited by England's legal system, and emerged in 1215 as part of the Magna Carta". On the 21 May 1840 New Zealand became a Crown Colony and inherited England's legal system, the Magna Carta and the **Law of Nature**. The **Law of Nature** existed long before Maori stepped foot in New Zealand – it over-rules all other laws and cultural rights – **it is the Law of Nature!**

The Crown holds the Foreshore and Seabed in trust for all the people of New Zealand irrespective of race, colour or creed, therefore the Government of the day has no right to grant exclusive rights to any single individual or entity. Giving ownership or rights to an individual or entity would breach the Law of Nature and infringe on the publics right to access and use the resource. See article below.

These laws were in existence long before the Maori race ever existed in New Zealand, therefore over-rule Maori Customary Rights!

Public land ownership

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 all 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.

Instruction to Governor Hobson.

Instructions to our trusty and well-beloved William Hobson, Esq. our Governor and Commander-i--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.

‘Public Access’

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.

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.

The One New Zealand Foundation believes this Bill must be amended to read:

The Crown must retain the Foreshore and Seabed in trust for all the people of New Zealand but any area that a group of New Zealand Citizens can prove to be of significant wahi tapu/sacred value must be respected by the public and protected by the Crown.

The End.Law of Nature Over-Rules Marine and Coastal Bill?