# Public Access New Zealand

INCORPORATED

P O Box 5805 Moray Place Dunedin New Zealand Phone & Fax 64 3 476 1544


Thursday, 10 March 1994

Parliamentary Commissioner for the Environment
P O Box 10-241
Wellington

Your ref: JS 50-1

Attention: Kirsty Woods

## Investigation into Treaty of Waitangi negotiations and involvement of affected parties

Thank you for the invitation of 7 December 1993 to comment on the terms of reference for the enquiry now under way. On 16 December I, in part, responded by supplying a copy of 'The Principle of "Partnership" and the Treaty of Waitangi' by myself, noting that there were related 'base' issues that required consideration in such a review.

In the light of subsequent experience in the current claims process involving public and Crown lands, we are now better able to respond to your invitation. I would appreciate you bringing these matters to the attention of the enquiry panel.

You identify nine issues in regard to "Crown" land. I will comment in turn on each of these and add some further issues for consideration.

**1. The identity of the Crown and the role of the Government.**
This is the subject of some debate because of uncertainty as to the identity of the 'Crown' relative to the Executive, with the 1840 vs 1994 dimension added. We are unable to contribute anything of substance to this matter. It is clearly an area that requires determination.

**2. The Crown's responsibility to Maori under the Treaty.**
The Crown's obligations are a matter of continuing interpretation of the Treaty. Interpretation is undertaken by the Courts, the Waitangi Tribunal, and the Government. To clear away some of the mythology that surrounds the Treaty, and assumptions arising therefrom, was one of the reasons for publishing 'The Principle of "Partnership" and the Treaty of Waitangi'.

The central assumption that is currently directing the Treaty settlement process is that a 'partnership' exists between Maori (collectively), and the Crown or 'Pakeha', although the identity of the second party has been made ambiguous by confused judgements and commentary from the Court of


Public Access New Zealand is a charitable trust formed in 1992. PANZ's objects are the preservation and improvement of public access to public lands, waters, and the countryside, through the retention in public ownership and control of resources of value for recreation. PANZ draws support from a diverse range of land, freshwater, marine, and conservation interests representing approximately 250,000 people from throughout NZ.

Appeal. A commonly presumed and officially promoted relationship is that there is equality between the 'partners'. That is, that Maori, despite being numerically a minority, are entitled to (at least) half of any Crown resource that they show an interest in, whether that be way of a formal claim or by other means. While we acknowledge that a special relationship exists by virtue of the Treaty, we question the existence of a 'partnership', and most definitely contend any notions that there is an equality established between one class of citizens and all other citizens. To accept such an interpretation ignores and negates Article Three of the Treaty which confirms that the acceptance of the terms of the Treaty by Maori would establish the same (and not greater) rights or entitlements, and duties of individual citizenship, as the people of England. A 'Partnership' view accords greater entitlement to Crown resources by Maori citizens than other citizens. We believe that the only instance where that would be permissible is when there are proven breaches of Article Two requiring use of Crown resources to redress such breaches.

The heart of the matter is proof of breach by the Crown of the terms of the Treaty. That is the role of a properly constituted independent body to determine, in this case the Waitangi Tribunal, not for the Crown or Maori to determine. The latter is becoming more prevalent, particularly as the Government pushes for quick settlements.

We believe that the government policy document 'Principles for Crown Action on the Treaty of Waitangi' 1989 adequately describes the Crown's responsibilities to Maori. This document should be reaffirmed as Government policy, subject to periodic review as a consequence of any major developments in the Courts or in statute.

Flow-on issues that arise from issue #2—

**Is there a responsibility of 'Pakeha' to Maori?**

Many commentators claim so but this appears founded more on notions of 'partnership' and social policy (eg. promotion of bi-culturalism) rather than on the terms of the Treaty itself.

**Is there a reciprocal Maori responsibility to the Crown or 'Pakeha'?**

Is there a duty for Maori not to claim preferential ownership, use or management over public resources that were lawfully sold to the Crown? We think so.

There is also a duty to abide by the law, and to make representations to change the law through democratic process if dissatisfied with it. Currently there is widespread disregard for the existing statutes among 'claimants', and a sympathetic bureaucracy, which is subverting due process by advancing 'sustainable management/utilisation' preferences over public lands held for quite different purposes —preservation in perpetuity for their intrinsic values and public use.

**3. Accountability of the Government to the public.**
There are at least two grounds for stating that the Government must be directly accountable to the public for its actions involving settlements using public lands.

(a) **Obligation to uphold Treaty 'principles'**. All citizens have an interest in being able to judge whether the Government and its agents are acting in accord with the principles of the Treaty. Section 4 of the Conservation Act provides for the Act (and related Acts?) to be interpreted and administered so as to give effect to the principles. The public must have sufficient information about what is proposed in individual settlements to be able to know if section 4 is being complied with.

*The sole legitimate basis* for the Crown responding to Maori claims over Government-held assets and lands are *proven* breaches of the Treaty or Treaty Principles.

Increasingly we are witnessing Crown proposals for the use of public conservation lands in settlement of 'claims' that are either unproven or disallowed, or in response to some higher but ill-defined 'duty' to divest public lands to some Maori (Cf Stephens, Crown Titi and Codfish Islands, Mt Hikurangi). Other proposals for use of high public interest Crown lands such as the former Greenstone, Elfin Bay and Routeburn Stations are contrary to Waitangi Tribunal findings on such lands. We believe that the current approach is rapidly discrediting the settlement process and by implication the Treaty and its 'Principles'.

The Waitangi Tribunal was established to inquire into the validity of claims and to reach findings of fact and make recommendations based on such findings. It is not empowered to make recommendations or express personal preferences that are not founded on its findings. However in its enthusiasm for social agendas such as bi-culturalism it occasionally does so. Such 'extra curricular' commentary or 'recommendations' provide no proper basis for Government action. In the main however the Tribunal has done a fair job of assessing claims and in our view it should be given greater resources so it can handle all claims. We are particularly concerned that the Tribunal hearing procedure is being increasingly by-passed by direct negotiations between Crown and claimants. It is a breach of the rules of natural justice that the Crown, as the alleged perpetrator of wrongs against Maori, should be taking on the role of the judge of its own actions in such matters. The Waitangi Tribunal was expressly established for this role. There is no "transparency" in secret back-room deals that require no public record or burden of proof on any of the parties.

If the Crown purports to be acting on behalf of the 'Pakeha' party to the Treaty it needs a popular mandate for its actions, particularly when dealing with lands held in trust for public benefit. Firstly however it must be clearly established that the Treaty or its 'Principles' have been breached by the Crown in regard to particular lands. Unless the 'public Pakeha' are satisfied on both counts the Crown has no legitimate basis for dealing on their behalf with public lands in claims settlement. We go further by concluding that if the Crown uses public assets for settlements, in the absence of or contrary to proof that the Treaty was breached, then the Crown is committing a violation

of the principles derived from Articles Two and Three. Injustices created from ill-founded claim settlements not only infringe the equal citizen rights confirmed by Article Three but make particular settlements liable to be re-litigated in the future.

We do not believe that attempting to call governments to account through the ballot box, a course often trumpeted by Government, provides any measure of public accountability. We have detected no material difference in policy or practice on Treaty matters between the main political parties whether in or out of Government.

(b) **An underlying presumption within Government that *all* lands and assets held by it have the same standing in terms of availability for Treaty claims settlement and that the 'Crown' has sole jurisdiction to decide the future of public lands. That is a proposition we strongly disagree with.**

Unlike SOE assets which are wholly-owned by Ministers on behalf of the Government of the day, public lands held under the National Parks, Reserves and Conservation Acts have a duty of trust imposed on the managers that they will only be held and administered for the purposes of their reservation. There are specific bars on alienation to the extent of requiring special empowering legislation for revocation. While held for "conservation purposes" there are requirements for preservation in perpetuity for the benefit, use and enjoyment of the public and consequently are unable to be converted to other purposes. Any alienation to private interests or change of purpose would be an infringement of the duty to continue to hold for public use and preservation of intrinsic values etc. We believe that the duty of trust is enforceable through the Courts.

Public lands have a special status relative to Government SOE assets and Crown lands, requiring a mandate from the true owners, the public, for their use in claim settlements.

**4. The achievement of durable settlements in an environment where many members of the public are not well informed on Treaty matters or Maori values.**

Firstly we wish to say that we desire durable settlements. However we believe that government is going so far off the rails in its handling of 'settlements' involving public lands that durable solutions will not be possible. Most of the public conservation estate has been afforded its current protective status as the direct result of decades of battling by non-government organisations and inspired individuals. Powerful exploitive interests and generally disinterested or hostile governments have had to be overcome by massive citizen campaigns. Such efforts have been responsible for the vast majority of public lands being set aside for preservation and public use.

Some of the public estate has resulted from Maori initiatives (eg the core of Tongariro National Park by gift from Te Heuheu Tukino) and other private landowner gifts, but relatively little from Government or bureaucratic initiatives. Extensive areas have been gifted to the Crown by individual

landowners under an expectation that such areas would continue to be held and managed by the Crown for the purposes of the gift. If such lands are now liable to use as expendable resources in claim settlements, where does that leave the donors and their descendants? Also the future availability of private lands for gifts or concessionary sales to the nation are likely to be severely affected.

I was in part responsible for rescuing 600,000 hectares of Crown lands with high conservation and recreation values that was destined for allocation to SOEs in 1986/87 and eventual privatisation. Those hard-won gains for the public estate and all that preceded them are not going to be lightly dismissed by public interest groups because governments now see the public estate as a cheaper fix for Treaty claims than use of their commercial assets. The NGO conservation-recreation community is not going to lamely accept unjust dispossession of the commons to any private interest. Our opposition exists irrespective of the race, cultural preferences, or commercial ambitions of any 'claimant'.

The second part of issue #4 reflects a prevalent 'politically correct' view of (all) opponents to settlements involving public or any other Crown assets. The implication is that those who question settlements are ignorant and need to be educated about 'The Treaty' and related matters. If we did know 'The Truth' our concerns would prove to be unfounded and all would subside into a state of social harmony and justice for all.

The culturally "correct" line is that whereas (all) 'Pakeha' culture is materialistic, individualistic, non-spiritual and exploitive about the environment, (all) Maori culture puts spiritual and communal matters ahead of material and individualistic needs and is by definition 'conservationist'. Even the most cursory examination of the huge diversity in current outlooks and practice within the multi-cultures and sub-cultures that exist in these groupings demonstrates that the above view is blinkered and simplistic to the point of being insulting.

An implication of the statement that many people are not "well Informed" on Treaty matters is that there is only one 'correct' view of and knowledge about the Treaty. It is a nonsense to suggest that there can be only one legitimate view on any subject. What the statement reflects is the lamentable fact that one view of the Treaty has been promoted over the last decade to the extent that other views and their messengers have either been derided or suppressed. Most employees in the public service, education, health and welfare services could confirm the degree of suppression and brain-washing that has taken place on the insistence or with the blessing of the state. We sincerely hope that for the greater welfare of New Zealand society that the debate will mature beyond now tired clichés and accusations of 'racism' directed at anyone who dares to question or present a differing viewpoint.

There is lot of scholarly work on the Treaty and related matters that does not conform to the currently 'politically correct' view. Those who have written or studied such works are not necessarily poorly informed but most likely have been shouted down by those who cannot tolerate the dissemination of information or opinion divergent from their own. While being pronounced to be a 'living instrument' it seems contradictory that discussion of the Treaty

and its meaning can be bound to one view, being unable to evolve and develop along with society.

**5. The apparent conflict in values between influential public interest groups and Maori, for example preservation in perpetuity vs sustainable use.**

There are very significant conflicts in values. That is one of the key issues, but it is not the central one—which is that the public conservation estate is held in trust, under a number of statutes, for purposes that are at major variance with the cultural preferences of many iwi. These lands are also held for purposes antagonistic to the preferences and demands of millers, miners, graziers and other "sustainable harvesters", and industrialists, but that does not of itself create any onus for changing the purposes of protected areas. Quite the reverse. Such exploitive pressures validate the special status of protected areas—they exist for the purpose of preventing extractive and exploitive industries and uses. It has been those threats that have provided the impetus for the creation of most of our parks and reserves.

As I have commented in 'The Principle of "Partnership" and the Treaty of Waitangi' there is a major gulf between the existing legislative purposes for Crown protected areas and the variously expressed 'conservation-for-utilisation' preferences of many iwi. Fundamental changes to the founding 'preservation-with-use' philosophy for protected areas and to public rights of access and enjoyment are at issue.

There is no one form of "conservation". 'Conservation' can serve very different ends and result in very different outcomes. For instance a pastoral farmer can justifiably describe himself as a 'conservationist' as he goes about 'conserving' feed for the winter requirements of his stock while maintaining ground cover as protection against soil erosion. However through selective grazing or removal of species, grazing systems progress towards monocultures of desired or 'useful' species that serve the need to producing a product that is consumed. Harvesting of naturally occurring species (on a supposedly sustainable basis) can modify a 'natural' environment to the extent of local extinctions of the target species and incidental loss of others. This can occur either through over-harvesting, by deliberate killing of protected species, or by introduction of predators. The Titi Islands off Stewart island are a case in point. Despite many of these islands being internationally important as wildlife sanctuaries the whole management of the islands has been skewed towards titi harvest at the expense of biodiversity and the protection of otherwise absolutely protected species. While the extent of modification may diifer, the process of degradation is little different from that imposed by farming in another environment.

To restate —there is a huge gulf between 'utilisation conservation', and the preservation of intrinsic natural life forms and values for non-utilisation purposes. The latter ideals are embodied in the statutes that govern such lands. Such statutes were hard won through the democratic process. They cannot be lightly dismissed. The Acts spiritual components contradict the stereotyping of predominantly 'Pakeha' society as expressed earlier.

Advocates of "sustainable management" of protected natural lands are in effect arguing for a change to the essential character of public lands and who the intended beneficiaries are. They fail to acknowledge the legitimacy of the existing purposes or their undemocratic approach to subvert the purposes. They are not alone. The Department of Conservation is also attempting to subvert the purposes of protected areas by advocating "sustainable management" and not the protection of intrinsic values (eg., in its 1993 advice to the returning Minister of Conservation). Such advice contradicts the laws the department is charged with upholding.

If others disagree with the purposes of protected areas they should use democratic means of advancing their interests via political and parliamentary process. Maori, like anyone else, has had opportunity to contribute to our laws and continue to contribute to their amendment. However there must be full public debate over the objectives of these areas and not a 'cultural annexation' at the expense of others' legitimate expectations.

**6. Public distrust of "secret deals" (and of Government).**
This primarily arises out of the popular perception, and we would also say duty under which Government holds public lands, that in fact they are owned by the people and not by the government. These lands are regarded as the birthright of all New Zealanders not to be alienated without the express consent of the people by a prescribed democratic process.

The distrust arises from the antipathy that the Crown has for consulting the people on Treaty related matters affecting public lands, and its cynical promotion of the use of public lands for settlement of claims, proven or unproven, ahead of its SOE assets. The credibility of the Government is further questioned as more people realise that many of the 'settlements' promoted by the government have little or no bearing on the Treaty or on proven breaches of it. It appears that the Government is, as an expedient, hiding behind a mantle of "the Crown as a Treaty partner" to avoid public scrutiny of its actions. Repeated messages from Government are that it sees no necessity for public ownership and management of public land. This fuels public alarm that settlement of alleged beaches of the Treaty is merely a convenient ploy to achieve privatisation of public lands and the extinguishment of public oversight of their use and management. Every other Crown asset has been either sold or corporatised en-route to privatisation; national parks etc., are merely next in line!

The distrust could be eased by recognition from Government that it is not the owner of public lands in the sense of it alone being able to decide their future and by throwing the whole process open to public disclosure, submission and comment. When the process is "transparent" and politically accountable the distrust should subside.

**7. Maori distrust of some public interest groups.**
Having being at the receiving end of racist slurs and vitriolic attack from representatives on one iwi in particular, we have difficulty in distiling much rationality behind the apparent distrust of us. There is limited scope for open communication when to merely question the process and raise concerns

about the possible outcomes results in a constant stream of labels such as "Green Group SS" and "peasant racism" etc., being thrown at us.

We sense that much of the loathing directed at us arises from a long-standing sense of grievance, which the Waitangi Tribunal finds is not entirely well-founded, and frustrated ambitions, arising with a disregard for the legitimate interests of others outside of the iwi, Pakeha or Maori. Little effort seems to be made to discuss differing philosophies of conservation management. It seems to be a case of "supplant our management preferences for yours".

It is often said that 'Pakeha' need to learn more of Maori culture and aspirations. In recognition of the reality that New Zealand society is multi-cultural rather than bi-cultural, effort towards mutual understanding needs to be multi-directional.

We see no difficulty in greater involvement by Maori or anyone else in the management of New Zealand's protected areas, however with three riders. There must be competence, commitment to the legislative purposes of those areas, and the involvement must be publicly controlled and accountable. If other purposes are desired that should be first promoted through democratic process as suggested earlier.

**8. The requirement under statute (for example the Conservation Act) to consult the public over the management of public lands.**
We do not see why this is seen as an "issue". Public consultation is an essential safeguard against abuse of the trust under which the lands are managed. It is in statute to ensure that the patrimony of all New Zealanders in these lands is equally recognised.

We guess that a reason some (Maori) see public consultation as an "issue" is that it frustrates their ambitions for tribal authority and control over resources, which we contend belong to all New Zealanders unless proven to have been wrongly taken from Maori. Some Maori ambitions for control and benefit exceed regard for the terms of the Treaty or the legitimate rights of others.

**9. The adequacy of existing legal frameworks to reflect the interests of both the public and Maori in new joint management arrangements for Crown or public lands.**
From much of the foregoing commentary, you will see that we take issue with the presumption behind this "issue" that there is any Treaty obligation or necessity for the Crown to "share" its management responsibility for public lands with any private entities including Maori organisations or individuals.

The notion of shared management or co-management apparently arises from Government statements that are founded on the mythology of a Treaty 'partnership' between the Crown and Maori. We believe that there is cause to seriously doubt the existence of such a relationship as a basis for divesting public ownership or control over public resources.

Continued public and political accountability is essential to the continued fulfilment of the public purposes for which the land is held.

**In conclusion**, we believe that there is an urgent need for a public consultation process to restore public confidence in the Treaty settlement process by satisfying the public at large that—

(a) the Treaty has been breached in regard to particular Crown-held lands and natural resources, and
(b) remedies proposed by the Crown involving public lands and Crown lands of high public interest are consistent with the lawful findings of the Waitangi Tribunal and that alternative forms of reparation are inappropriate.

**A public consultation process**

PANZ is currently working on a proposed process that would entail the public release of resource and Treaty related information, disclosure of a range of options for possible settlement, public submission on those options, and public input into the Crown's final negotiating position.

We hope to have this proposal available for consideration by the enquiry panel within the next fortnight.

Thanking you for the invitation to contribute

Yours sincerely,

Bruce Mason

Bruce Mason
Spokesperson and Trustee

# Public Access New Zealand

INCORPORATED

P O Box 5805 Moray Place Dunedin New Zealand Phone & Fax 64 3 476 1544

Wednesday, 20 April 1994

Parliamentary Commissioner for the Environment
P O Box 10-241
Wellington

Fax: (04) 471 0331
Your ref: JS 50-1

Attention: Kirsty Woods

## Investigation into procedures for maintaining the quality of the environment in the settlement of Treaty claims.

Thank you for forwarding your confirmed terms of reference for your investigation, as entitled above.This investigation was previously entitled an "Investigation into Treaty of Waitangi negotiations and involvement of affected parties".

We are gravely concerned that from the change of title and the very constrained terms of reference now adopted that in fact you have embarked on a different investigation from the one you invited us to comment on.

We note in your invitation to us on 7 December 1993 that the draft terms of reference were based on the nine issues you identified in that letter. We submitted lengthy comment on those issues and identified for you further issues. We have difficulty in seeing how the majority of those issues can be addressed within the adopted terms of reference.

We also submitted to you for your consideration as a 'base issue' the question of whether a 'partnership' exists between iwi Maori and the Crown. You seem to have signalled, before such an important matter is investigated by the legal/constitutional experts engaged to advise you, that a 'partnership' exists. We note reference to "Maori as a Treaty partner' in your adopted terms of reference, whereas you referred neutrally to "the Crown's relationship with Maori under the Treaty of Waitangi" in December last.

At face-value it appears that your investigation has been hijacked, with quite different purposes in mind from what was embarked on. We fail to see how issues of the public's patrimony in public lands, rights of access, use and enjoyment, and rights of equality of treatment in terms of Article Three of the Treaty can be addressed by your terms of reference. Protection of the 'environment' is only one concern that arises from the inadequate process now employed by Government in its Treaty claim process over Crown/public lands.

Please urgently advise as to why the title and purpose of the investigation has been changed. We also need to know what definition of 'environment' is being used. Is it confined to the meaning contained in section 2 Environment

Public Access New Zealand is a charitable trust formed in 1992. PANZ's objects are the preservation and improvement of public access to public lands, waters, and the countryside, through the retention in public ownership and control of resources of value for recreation. PANZ draws support from a diverse range of land, freshwater, marine, and conservation interests representing approximately 250,000 people from throughout NZ.

Act 1986, and if so how, and is it your intention to, address within that definition the issues above and identified earlier?

Since our last contribution we have been going to considerable effort to prepare a possible process for public consultation on Treaty settlements involving lands of the Crown. It appears that our efforts have been wasted.

You investigation started with great promise that all public interest matters, both under the Treaty and specifically relating to public's vested interest in public lands, would be addressed. Unfortunately, from your most recent development, we cannot have confidence in the outcome of your investigation.

Yours sincerely,

Bruce Mason
Spokesperson and Trustee