Covenants & Public Access to the High Country

Dear Peter,
I have been meaning to write to you for some time about your editorial comment in the October issue of "The New Zealand Trout Fisher", welcoming the prospect of covenants over Crown land - "the most positive move towards the creation of public access in perpetuity I have seen . . .".
There are major problems with covenants, the big one being the lack of will to enforce them. Covenants are being promoted as the alternative to setting up public reserves and parks. The major interests that are promoting covenants are The Treasury, Federated Farmers, the runholder group High Country Trustees, and the Government. The farmer interests are heavily into promoting 'private parks' in the high country while remaining silent on the obvious implication of public use being rationed, if allowed at all, through the ability to pay for access and particular activities like fishing. There is also Guy Salmon, variously of the Maruria Society and the Progressive Greens, also promoting free market mechanisms such as covenants over freeholded Crown land, along with exclusive lodges for overseas tourists.
I enclose various papers for you to digest on the subject of covenants in general, and the Greenstone Valley issue, where the key valley floor is to be freeholded subject to covenants of uncertain nature and effect.
You also mentioned the idea of F&GNZ establishing a 'non-partisan' consultative position in the process of "the creation and disposal of covenants in the sale of Crown land". As a personal observation, it seems to me that the whole idea of Fish and Game Councils being 'non-partisan' or 'independent' strikes at the very heart of why such bodies were retained after the demise of Acclimatisation Societies, being separate from Government and funded by freshwater anglers. The councils are meant to be partisan, as advocates for anglers, otherwise there is no reason for their existence. Otherwise the Government might as well run the whole show.
Regards,
Bruce Mason,
Public Access New Zealand.

Maori Land Court's view on covenants

(extracts from Court Minutes in regard to application by Minister of Conservation for Court Order for vesting ownership of Mt. Hikurangi in Ngati Porou)

18 January 1991 "Firstly, encumbrances on the title separate from the legal interest. The legal interest is vested in perpetuity. *You are not bound by the terms of those covenants in perpetuity. You are not precluded from changing things by agreement.*"
Secondly, it is a matter for the Runanga and the Department of Conservation. *The conservation covenant is not a perpetually binding covenant precluding the right for further discussion. But you have got the option of going with it as it is and negotiating those things later* or adjourning the matter now and discussing it further.
("Court explains in an effort to highlight the issue, that the Crown doesn't have to vest the land and can't be compelled to. They have the right therefore to set conditions on the vesting to maintain an involvement over aspects of use. *Conditions reserving rights are negotiable in the future. Conditions may simply represent a gradual process of complete transfer.* Owners urged to consider those issues but for them to decide.")
14 March 1991 *"If necessary conditions imposed can be removed. DOC has no objections."*

Thanks for your letter, Bruce, it's always interesting to hear your views as you are someone I know speaks entirely from a position of principle, in terms of public access.
Firstly, by 'non-partisan' I meant that F&GNZ should, by virtue of its function as the head of a public pressure group that is supposed to be aligned to neither the seller nor the buyer, be in a position to deliberate on the matter of Crown land sale without prejudicing the public interest. If such a consultative body was to be formed, however, I would also expect other public interest groups, including PANZ, to become members, because the interests of anglers and hunters alone are too limited to encompass the general public good. In case I haven't made this clear before, my long-established support for PANZ reflects this line of thinking.
Covenants. I don't like them much either; but I do believe that they are a starting point in a crucial (to the public interest) process that has dragged its heels for too long. If, and I am very much aware of your concerns over the example of Mt. Hikurangi, it became obvious that there was a general tendency for ex-Crown landowners to renege on the provisions of those covenants placed on them, surely public outcry would force the Government to act? Surely no New Zealander would be prepared to so easily abandon one of the major assets of his or her birthright?
Hopefully, however, with MMP things will improve. If we, the New Zealand public, allow this golden opportunity to secure adequate access to public lands that are being sold slip, we will most surely need our heads read! We would also, I suspect, incur the everlasting contempt of future generations.
Regards,
Peter Storey.

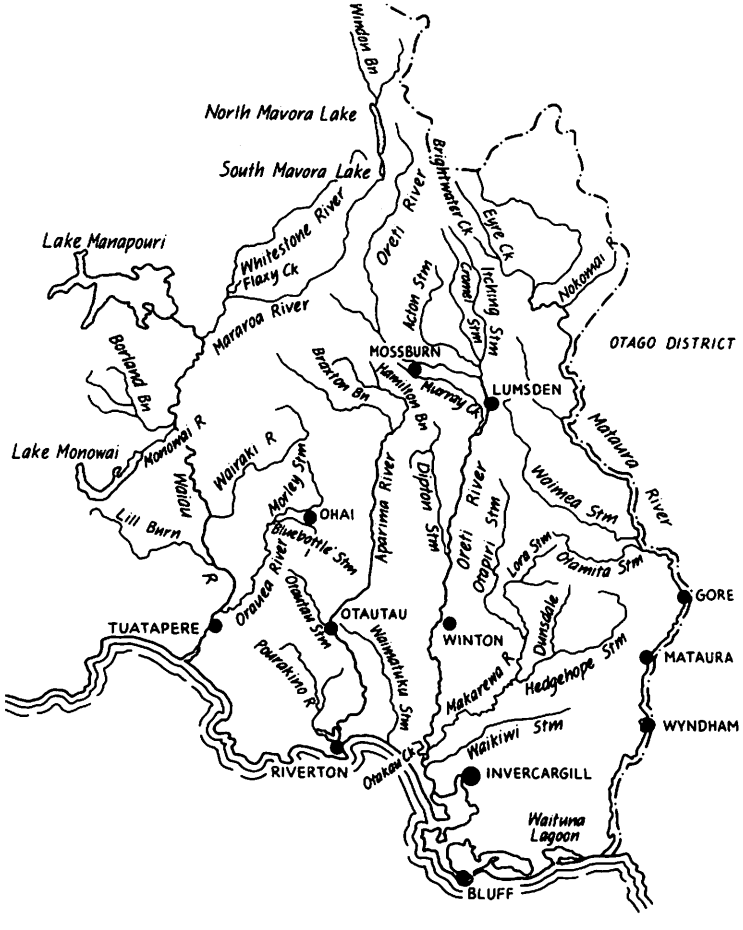
The Bottom Line

from ***Sylvester Hoffman***

It always seems to blow and rain on Labour Day; it is the season of the equinoctial gales, of course, and most times the only way to beat it is to get out and face it. If there was a choice between the two evils, I reckon I'd prefer the rain - there is no worse pestilence than a strong, cold wind when fishing; it usually blows downstream, to make casting against it a trial of the worst dimension. And so it was last Labour Day; the rain splattering icily against the cabin window, not heavy, but enough to discourage angling.

"Labour Day," bemoaned Brian, "why does it always rain on Labour Day when we're going fishing?" The inevitability of facing the usual Labour Day was evident by the note of bitterness, as though it was his last day on earth. Like many others we were cooped up in camp, resigned to the fact that if it wasn't for the rain we would be out there looking for fish. Anglers are supposed to be philosophical about such tribulations as inclement weather, but I could tell by Brian's fidgety, impatient performance that some action was necessary. It did not require much discussion to decide that the best move would be to break camp and hope to do some fishing on the way home. A quick cup of coffee and we were on the track which wound close to the river bank, alongside a mile or so of promising water. Still the rain pelted down, offering no incentive to stop until the last possible moment.

Then, quite suddenly, there was a lull which coincided with the car alongside a long, shallow ripple running into a deeper pool of great promise. Eyes were soon focused on likely lies for trout. Sure enough Mark, the youngest member of the party and the one with the sharpest eye, noticed a movement near the edge of the current. Further inspection confirmed a trout nymphing in earnest, so much so that one would think it had thrown all caution to the wind. A heavy fish too, but here was a chance to either try for it or exercise some prudence; if Mark was to hook and play his fish at the head of the pool it would be likely that any other trout in it would be spooked and further sport would be finished. So it was suggested that this fish would be Mark's prize, but that a reconnaissance from the tail end of the pool first would be the way to fish the water; and Mark, to his credit, controlled his youthful enthusiasm like a gentleman. We walked downstream, keeping well away from the water and commencing at the tail of the pool with a thorough inspection. Unfortunately, the three fish seen wouldn't cooperate to nymph or dry fly, but when Mark planned his attack with a #12 *Black Spider* kind of nymph and cast ten feet upstream of his trout - Bang! Instantly, the hooked fish raced downstream for the nether-side of an old bridge pile; but alas - just holding a bit too hard, I think. He wound in to find the cast had broken off at the knot to the nymph,



Knots are always the weak point and should be checked regularly. It is hard to define "regularly", but just check all your knots every half-hour or after landing a fish, whichever is the lesser of the two times (reminds one of how to fill in the income tax form).

To cut a long story short, that first stretch of water held four weighty fish which are probably still there. They were fished for within an hour and it was raining most of that time. They were all feeding on something, but it was just the one fish that took the nymph without hesitation.

Such an experience can teach us a lot if we want to be pedantic about any fishing episode. Firstly, fish will feed at any old time and when it is raining is often as good a time as any to take a fish. The rain seems to stir up feed along the banks. Secondly, like the top-dressing pilot, it is a good idea to be out early, before the wind gains its full momentum - one angler we met the day before had a good bag of three fish before eight o'clock, but after that he fished some miles of good water all to no avail. It has been demonstrated time and again that the best fish are

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Friday, March 14, 1997

Bryce Johnson
NZ Fish & game Council

Becroft decision on Taranaki Fish & Game Council v Kirk McRitchie

I have read the full decision and Sir Geoffrey's correspondence with yourself and Peter Hill. (Niall forwarded these to me).

As someone who has taken an active interest in the Treaty, and the Courts' deliberations on it, I offer the following thoughts regarding grounds for F&G appeal.

As I am reasonably familiar with the development of so-called Treaty jurisprudence over the last decade, I believe that it was almost inevitable that Judge Becroft decided the way he did. The Courts and Waitangi Tribunal have become politicised or 'socially adventurous' in their determinations. Judge Becroft's decision flows on from the follies of the Court of Appeal and the Waitangi Tribunal. Judge Becroft has uncritically adopted other's reasonings. He has not examined the assumptions and omissions behind previous judgements.

I believe that his decision, like many other Court's decisions on which he relies, is fundamentally flawed. He has adopted the Ken Mair view of the Treaty, by plucking out isolated terms and phrases from Article II, principally 'tino rangatiratanga', and interpreting their meaning completely out of context with the rest of Article II, as well as Articles I and III. The fact that other courts have done the same does not validate their reasoning or judgement.

I am pleased to see that the appeal will raise matters of treaty interpretation (a whole-Treaty approach) which I believe has been absent from the arguments heard before the Tribunal and Courts for too long. Continuation of a 'politically correct' and myopic approach not only endangers sports fisheries but just about ever other civil freedom and democratic right New Zealanders enjoy. It is an attack on the very foundations of our society. Despite the ravings of Mair et al, I, and most New Zealanders, are indigenous New Zealanders (having being born here). I know no other home and am not about to be deported or turned into a second class citizen or 'invitee', despite the best effort of the Courts. If the decision established by Judge Becroft stands there is

little further judicial 'reasoning' required to extend its application to just about every other sphere of civil and public life.

The Treaty of Waitangi (my emphasis added)
In 1840 the Crown and the majority of Maori chiefs signed a compact that created reciprocal rights and obligations for both parties. The Treaty consists of a preamble, three articles, and an epilogue. In broad terms, on the ceding of the right of complete sovereignty **or** government (Article I) *and the granting of exclusive pre-emptive (purchase) rights of land to the Crown* (Article II), Maori would retain either exclusive and undisturbed possession of their lands and estates forests fisheries and other properties *so long as it is their wish to retain the same in their possession* **or** the unqualified exercise of chieftainship over all their lands, villages and all other treasures (Article II), and be given the same rights *and duties* of citizenship as the people of England (Article III).

Article II
The text in English
"Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of *their* Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess *so long as it is their wish and desire to retain the same in their possession; **but*** the Chiefs of the United Tribes and the individual Chiefs *yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate* at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf".

The text in Maori
"Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona".

Translation of Maori text
(by I H Kawharu in, 'Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi' (1989) --a reconstruction of a literal translation).
"The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. ***But on the other hand*** the Chiefs of the Confederation and all the Chiefs *will sell land to the Queen* at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent".

Judge Becroft perpetuates the myth that there is an **unqualified reservation** to Maori of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties.."

under Article II. Clearly, in the full context of Article II, as well as Articles I and III, this is not the case. I believe such selective quotation by people trained to be analytical and inquisitive to be professionally dishonest if not fraudulent. Such is the power of political correctness! Unfortunately the consequences for the rest of us may be profoundly detrimental.

The matters and resources that should be subject to tino rangatiratanga are those reserved to hapu under the Treaty, not **all** lands, forests and fisheries as implied. The latter view ignores the land sales provisions of Article II. If land and associated resources have been lawfully sold to the Crown then tino rangatiratanga is extinguished over these.

I have examined the sales deeds for most of the South Island and have found that "rivers, lakes, the woods, and the bush, and all things whatsoever within those places, and all things lying thereupon" were explicitly sold by chiefs to the Crown. I am aware of similar North Island provisions but do not know the Wanganui river situation. I believe that this is an area you should look at in your appeal. If there was a valid land sale or sales to the Crown this may well have included the river and its resources, including 'fisheries'. If so, end of argument. I am aware that the Wanganui District Council went to court to determine the question of ownership of the Motua gardens and the Court found in their favour. If there was no land/resource sale to the Crown of the Wanganui River etc, and/or the Wanganui chiefs did not sign the Treaty, then the applicability of the Maori 'reservation' under Article II is an open question.

Another matter is the meaning of 'tino rangatiratanga'. Even Sir Geoffrey believes that Article II "concerns protection of Maori *sovereignty* and mana over treasured goods and fisheries..."

Most definitions I have seen have 'rangatira' meaning chief; 'rangatiratanga' as chieftainship; 'tino rangatiratanga' being a superlative form of chieftainship or evidence of greatness. It is nevertheless a different and lower order of authority from the supreme sovereignty ceded to the Crown under Article 1.

The Waitangi Tribunal is of the view that tino rangatiratanga does not refer to a separate sovereignty but to tribal self management on lines similar to what we understand by local government. "Contemporary statements show well enough that Maori accepted the Crown's higher authority and saw themselves as subjects, be it with substantial rights reserved to them under the Treaty" (I could find the particular case if necessary).

The main point of Article II was to prevent (at Maori initiative) racketeering 'land sales' between a variety of dubious foreigners and 'chiefs' who were not duly authorised to sell. The pre-emptive right of the Crown to purchase any lands which the proprietors "...may be disposed to alienate..." is the main effect of Article II. It certainly does not hint at any possible separate legal system or jurisdiction for Maori any more than for other landowners.

Judge Becroft has gone far too far and his judgement needs to be overturned. I wish you well in doing so.

A final point: I note that you will be pursuing the matter of the meaning/scope of 'fisheries'. You should challenge the assumption that 'fishery' means (all) 'fish', and that 'customary' rights are synonymous with 'aboriginal' rights. The Judge used these terms interchangeably, yet they have different meanings. There are no aboriginal people left in NZ. If the judge means 'indigenous', every New Zealander born in NZ is indigenous. Look at the dictionary meanings!

BJ Mason

Bruce Mason
PANZ Researcher

cc Niall Watson OF&G C