# Explaining the Queen's Chain Myth: the Evolution of Laws for Marginal Strips

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ABSTRACT

*Requirements to reserve chain wide strips along water margins did not come from any royal decree to create "Queen's chains". Instructions from Chief Surveyors first required these strips on navigable rivers. Legislation in 1892 required strips on the coast, large lakes and rivers more than 10 metres wide. For sales of Crown land since 1948 the river width was reduced to 3 metres. Ambulatory strips apply only to water margins of land sold by the Crown since 1990. Crown land sales to companies and State Owned Enterprises have increased the amount of water margin strips available for public access or conservation.*

## Introduction

Marginal strips are the lands along the coast, river banks and lake margins that the Crown has retained when it granted or sold land. They have had various names in the past. They are the major part of lands colloquially referred to as the "Queen's Chain". This paper traces the evolution of the laws in New Zealand relating to the reservation by the Crown of these strips of land along the sea coast and along the margins of lakes and rivers. This review shows how the amount of water margin land that the Crown can retain has changed with successive legislative changes. The paper examines how the Lands and Survey Department dealt with the early reserved strips. It examines s58 *Land Act* 1948, the law changes for strips made in the *Conservation Law Reform Act* 1990, and leasing and licensing arrangements in the *Conservation Amendment Act* 1996. The paper provides a chronological review of the Crown land laws, from the *Royal Instructions* of 1840 to the *Conservation Amendment Act* 1996.

## The Royal Instructions 1840

Many statements made in recent years, about public access rights to land along water margins, claim that reserve strips originated from the *Instructions*[1] that Queen Victoria gave to Governor Hobson in 1840 when the colony of New Zealand was first established.

Nowhere do the *Instructions* refer to a strip of water margin land. However, sections 37, 43, 44, 49 & 56 of the *Instructions* are relevant. Section 37 provided for the granting of waste lands "to private persons for their own use and benefit . . ." It gave instructions on how the country was to be surveyed: into administrative units of counties, hundreds and parishes. Rivers, streams and highlands could be used to obtain clear and well-defined natural boundaries.

Section 43 is the most relevant to this discussion on reserving lands along water margins. It has been liberally interpreted to imply that some specific public right to the margins of all water ways was "enshrined" and " . . . a Kiwi version of the commons took shape . . ."[2]. Instruction 43 in fact required the Surveyor-General appointed by Hobson to report:

> *particular lands . . . to reserve . . . to be surveyed . . . for public roads or other internal communications, whether by land or water.*

The *Instructions* then listed other sites that might be selected. These included places

for recreation and amusement, places for promoting health, sites for quays or landing places " . . . on the seacoast or in the neighbourhood of navigable streams . . .". Subsequent actions indicate that only specific sites were selected; there was no general reservation of lands. Evans suggests that all governments since 1840 have failed to honour the Queen's wishes, perhaps, he speculated, because for 150 years they might not have been aware of them.[3] Chapple[4] and Evans appear to consider that these words from s43 define the Queen's wishes to create water margin strips:

> *. . . and we do strictly enjoy and require you, that you do not on any account or on any pretence whatsoever, grant, convert or demise . . . any of the lands so specified . . . to be occupied by any private person for any private purposes.*

Governments probably considered they had followed the *Instructions* when they reserved the various sorts of sites specified earlier in s43. It is not possible to interpret a requirement to reserve chain wide strips from these words. The administrators never did. Even today when the law is much more specific there is uncertainty about which streams require strips and reserves.

Section 44 instructed that land not reserved as required in s43 should be sold at one uniform price per acre. Possession of land could occur after payment to the Treasurer (s49). Section 56 instructed that no land "shall be sold . . . which the said Surveyor-General may report to you as proper to be reserved." The Surveyor-General opted not to reserve all water margin land.

## Land Claims Ordinances

Much land had been purchased directly from Maori prior to the Treaty of Waitangi. However, by the Treaty, all land was held from the Crown, so Commissioners were appointed to hear and to validate claims of direct purchase.[5] Ordinance No. 2, s6 required that there should be no grant of:

> *. . . any headland, promontory bay or island that may hereafter be required for any purpose of defence . . . nor any land situate on the sea-shore within one hundred feet of high water-mark.*

The following year, *Ordinance No. 14* 1842 gave specific details for grants.[6] Ordinance 2 from New South Wales was repealed by this.[7] Section 5 allowed grantees to select only one block and when a rectangle of land was ". . . bounded by the sea or a river, . . . the narrow side shall be bounded by the sea or any such river . . .". There was no requirement to create a 100 foot wide strip along the high water-mark. So the requirement for a universal 100 foot strip was law for only eight months.

The first specific requirements for chain wide strips of land reserved on banks of navigable rivers and possibly around lakes are attributed to Thomas Cass, Chief Surveyor for the Canterbury Provincial Government in 1851.[8] These were followed in 1862 by instructions from John Turnbull Thomson, the Otago Chief surveyor. He required his surveyors, to create:

> *. . . reserves 100 links frontage to navigable rivers. Reserve also centres of bushes, stone quarries, and sand pits for road making*[9]

## Public Reserves Act 1854

The General Government passed this Act shortly after the start of the provincial era. It shows that the government did not want to retain water margin land. The General Government granted all Crown land within a province to the Provincial Superintendent, except lands reserved for military purposes, for the needs of the General Government or for the benefit of the native inhabitants. *The Public Reserves Act* even allowed the Governor to:

> *. . . grant and dispose of any land reclaimed from the sea, and any land below high water-mark in any harbour, arm, or creek of the sea, or in any navigable river or on the sea coast*[10]

The only proviso was that these new grants would not ". . . prejudice the rights of persons claiming water frontage."[11] Thus existing private water frontages were to be respected and new ones allowed. Hughes observed that this actually reversed *Instruction* 43 given to Governor Hobson, that water frontage should not be occupied by any private person.[12]

## After 1876: The Post Provincial Era

When the provinces were abolished in 1876, all lands that had been granted to the provincial governments were re-vested in the Crown[13]. This included all forms of reserves. The *Instructions for Settlement Surveyors on Demesne Lands of the Crown* required reserves of 100 links frontage on all navigable rivers for surveys under the Land Act 1877 s169. Under the *Land Act* 1877, on water margins, a range of sites similar to that in the Royal Instructions could be reserved from sale. Docks, quays, improvement of harbours and landing places were included.[14]

The *Public Reserves Act* 1881 included three classifications for reserves. Reserves for harbours, navigation and miscellaneous purposes were Class III reserves and included foreshore reserves, landing places and quays. Any reserves, except those held for public health or recreation could be leased for up to 21 years.[15] It would appear that leasing of water front reserves was possible but of no great significance because much waterfront land was being granted in fee simple (freehold) anyway. Although leases and licences for water margin land have been portrayed as a modern government relinquishing long-held rights, their leasing dates back to 1881.

A national requirement for a chain frontage was included in regulations for surveys under the *Land Act* 1885. Surveyors were instructed to reserve:

> *. . . at least 100 links frontage to all navigable rivers and coast, making the traverseline if possible the boundary of such reservation.*[16]

There was no explanation of the term "navigable" nor any special classification of the land "reserved". These *Land Act* reserves were from rural (Survey District and Block) settlement surveys. Rural land was land outside towns, boroughs and cities. The regulations were not written in a way that they would apply to "Town Surveys" - urban areas or proposed towns. Nor did they apply to "Surveys of Native Land". These had their own separate parts in the survey instructions under the *Land Act*.

## Land Act 1892

Five decades after the *Royal Instructions*, the *Land Act* 1892, s110, set new, clear legislative requirements for a 66 foot (chain) wide strip of land to be reserved from sale:

> *. . . along high-water lines of the sea and of its bays, inlets and creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thirty three feet and in the discretion of the commissioner, along the bank of any river or stream of less width than thirty three feet.*[17]

Here, for the first time, legislation required strips along all the coast and specified the widths of rivers and the area of lakes which should be considered.

The requirement for special sites to be reserved that dated from the Royal Instructions was continued in s15. Section 15 noted that the special sites might be "on the seashore, margin of lakes, or on riverbanks" However, s110 was new law. It introduced the requirement for lake margin chain strips.

The main thrust of the *Land Act* 1892 was to get settler farmers onto the land quickly. In Parliament, Buckley, commenting on clause 15 of the Bill, agreed that to exclude from sale land on the seashore and on the margins of lakes and rivers was a good idea. He observed:

> *. . . in the past we have parted with rights to the foreshore - a proceeding which has given rise, I am satisfied, to more litigation in this colony than any one could possibly have contemplated.*[18]

Another Member, McGuire, objected to the 33 foot width criterion for rivers and particularly to the additional discretion of the commissioner to reserve land on rivers of lesser width.[19] Thus only since 1892 has there been national legislation requiring water margin land to be reserved, with lake size and river widths included.

Around this time, the Lands and Survey Department and the courts confronted some of the uncertainties of title to land on water margins. Kearns and Kerr,[20] and Hughes[21] refer to the confusion that existed from 1890 to 1914 as to the status and purposes of the water margin land reserved from sale. Chief Surveyors were uncertain how to describe and depict this land on plans and different Land Districts had followed different practices. A memo from Surveyor-General, S Percy Smith, in 1890 explained:

> *. . . in all cases where reservations are made along river banks, sea coast, lakes etc. that they are called Road, that official plans showing them coloured Burnt Sienna . . .*[22]

However, in 1904, the Surveyor-General, on the advice of the Crown Law Office advised that:

> *. . . reservations made along riverbanks under Section 110 of the Land Act 1892 are not roads but Public Reserves.*

His circular went on to explain that the chief purpose of such reservations was not as roads but to ". . . prevent the acquisition of riparian rights by land owners".[23]

A further circular in July 1904 advised that any roads delineated on public maps were "roads in terms of Section 100, sub-section 1 of the *Public Works Act* 1894"[24]. In 1914 E H Wilmot (Surveyor-General) introduced the modern concepts - reserves vested in the Crown. He noted that by showing the strips as road, "the legal status and control of these reserves" had been altered from what had been intended. Wilmot required the strips to be shown red or pink and if possible, labelled "River-bank Reserve".[25]

The requirement did not apply when the land was for an actual road, nor did it apply to reservations made by the Native Land Court. Thus the public's "right of access" to even significant water margins was hardly certain because a particular river or lake margin, or stretch of coast might remain in native ownership.

The status of riverbank land required for road was addressed in *Pipi Te Ngahuru v The Mercer Road Board* (1887)[27]. The court allowed the Road Board to take part of the plaintiff's land, without compensation, to replace land washed away by the Waikato River. The rule in this decision did not prevail following the decision of Cooper J in *Attorney General and Southland County v Miller* (1906)[27] where the situation had been similar. There, Cooper J held that the position of any road cannot move with any meandering of the river or alteration (erosion or accretion) of the sea coast. The rule applied to any water margin strip. Judge Cooper's decision prevails and has been far-reaching in protecting private ownership rights in land separated from a water-body by a road, reserve or some other land reserved to the Crown. This judgement may explain the expression "once a road always a road".

## Land Act 1948

The legislation relating to reserved land on water margins from Crown alienations changed little in the *Land Act* 1924 (s129). The next substantial change occurred in 1948. This legislation then prevailed for several decades until the Lands and Survey Department was divided and the Department of Conservation was created in 1986. If the Crown alienated land before 1948, the rivers needed to be at least 33 feet wide for the surveyor to reserve chain strips. The *Land Act* 1948 never applied to private subdivisions, as the *Land Subdivision in Counties Act* 1946 existed. The *Land Act* 1948 was the law under which government farm settlement surveys were carried out following the Second World War. It is the law relating to water margins in the countryside that present generations grew up with. Section 58 required that surveyors should create chain wide strips along the coast, rivers and streams more than 10 feet wide (down from 33 feet) and on the margins of lakes more than 20 acres in area (down from 50 acres). Section 58(1) stated:[28]

> **58. Land reserved from sale** - (1) There shall be reserved from sale or other disposition of Crown land under this Act a strip of land not less than 20 metres in width -
>
> (a) Along the mean high-water mark of the sea and of its bays, inlets and creeks:
>
> (b) Along the margin of every lake with an area in excess of 8 hectares:
>
> (c) Unless the Minister considers it unnecessary to do so, along the banks of all rivers and stream which have an average width of not less than 3 metres.

The *Hansard* report of the debate on the *Land Act* provides no reasons for narrower rivers and smaller lakes. Surveyors have commonly referred to these water margin strips as "section 58 strips" because they were described on documents as being reserved under s 58 and were administered by the Department of Lands and Survey. The Minister of Lands was empowered to

approve the reduction of the strip width to 3 metres[29]. The requirement to reserve the strips also related to unsurveyed farm land, and to pastoral land being disposed of under long term leases. Thus strips were required on any leased land and might be created at lease renewal. No compensation was to be paid when the strips were surveyed off.[30]

## The Conservation Acts

The Department of Conservation (DOC) was formed in 1987 by the *Conservation Act* 1986. In 1990 DOC assumed control of all the marginal strip land.[31] From 1987, the Minister of Conservation became responsible for water margin strips reserved under the *Land Acts* and new "marginal strips". The *Conservation Act* in s2, defined "marginal strips" as land "being held under this Act for conservation purposes" along any foreshore of the sea, along the normal level of any lake over 8 ha in area and along the bank of any river or stream with an average width greater than 3 metres. These are the same dimensions used in the *Land Act* expressed in metric units.

By s24(1) no interest in a marginal strip could be granted or disposed of and the strips had to be managed for "the conservation of its natural and physical resources and those of the adjacent water".[32] Public access to the adjacent water would be subject to the conservation of those resources. For previous decades these strips had been reserved and used for access and even depicted as roads on record plans. The new conservation legislation made access subordinate to protecting conservation values.

Before central government restructuring began following the 1984 general election, land occupied by various Crown agencies was held together as "Crown land". This land included many potential marginal strips and existing chain strips. As the Crown sold land assets and State Owned Enterprises (SOEs) were created, their land had to be separated from the Crown land remaining with the government departments such as Conservation.[33] Landcorp, Electricorp and Forestcorp, particularly, were SOEs that acquired significant land assets from which marginal strips along water margins had to be reserved. However, for satisfactory operation and asset management, the SOEs and other organisations like port companies sought control of the marginal strips through or abutting their land.

The government wanted the SOEs quickly established and concluded that the cost and time needed to identify, survey, prepare and lodge plans showing all the water courses and their marginal strips was unwarranted. Therefore, undefined, ambulatory marginal strips were devised. Additional legislative proposals in 1989 would have allowed the Minister of Conservation to not create some new strips, and to allow him/her to sell some existing strips. However, these did not become law.

The *Conservation Law Reform Act* 1990 in Pt IVa, however, considerably elaborated the laws relating to marginal strips. Six purposes for the strips were noted in s24c, and s24h spelt out considerable detail for their management. However, of particular interest to surveyors, and a point that the New Zealand Institute of Surveyors Council made submissions on, was s24d(7). This section also concerned the wandering public. It stated:

> *Notwithstanding anything in the Land Transfer Act 1952, land reserved as marginal strip under section 24 of this Act shall not be required to be surveyed for the purposes of this Act.*[34]

All that is required is for the title of the land to record a statement that the land is subject to Pt IVa of the *Conservation Law Reform Act* 1990. The Chief Surveyor endorses the record plans with a note that marginal strips exist on the appropriate water margins. This was not particularly helpful for any person seeking access information, as notes on titles and plans do not show the location of the marginal strips. However, s24g allows these newly created marginal strips to remain on the ground and not to be lost by erosion. It states that the marginal strips created under the *Conservation Law Reform Act* shift with every alteration of the water margin. Thus, a person who is within 20 metres of the water (or the edge of the river bed or lake bed) is probably on the marginal strip, provided the land is subject to a post-1990 marginal strip.

This concept theoretically makes the strip easier for the public to identify but the occupier of adjacent land has uncertain rights. For example they will have to automatically relinquish title to land that is eroded. It also means that the Act's provisions will always protect the genuine riparian areas as the water shifts. On many watercourses, the line of the bank or edge of the bed can be very indistinct. The area near the river margin can be shingle, boulders or heavily vegetated. The width of the flow can vary even from hour to hour with storms in the headwaters of small catchments or where high tides back up river flows.

The *Conservation Law Reform Act*, s2 gave a new definition for the bed of a river or a lake. For a river this is ". . . the space of land which the waters of the river cover at its fullest flow without overtopping its banks". For a lake it is ". . . the space of land which the waters of the lake cover at its highest level without exceeding its physical margin". These definitions can be interpreted that if a "watercourse" has, or ever will flow three metres wide but stays within some banks, or a lake ever spreads to 8 hectares, then it should have marginal strips. Compared with what needed to be considered under the *Land Acts*, by this definition, many more watercourses, and possibly lakes, could be expected to include marginal strips when the Crown alienated or leased the surrounding land. In practice, where surveying fieldwork is carried out, DOC staff have indicated where they would require marginal strips.[35]

Where ambulatory strips are simply created by modern sale transactions, without field surveys, the public can presume any water margin there has reserved strips. How conservation values can then be safeguarded on specific watercourses is unclear. These rules of ambulation and stream bed width do not apply to water bodies where the landward boundaries of marginal strips have already been decided by field survey.

## The Public Misconceptions

There is a mistaken public perception suggested by Pennell's article in the Otago Daily Times in 1989.[36] This is that s58 or its repealing legislation, s24, applies to streams

through land already sold before 1948 or for s24, sold before 1990. However, s58 is not a commentary on the status of land or a retrospective decree. It was an instruction for *future* surveys of land held by the Crown. Proposals were omitted in the *Conservation Law Reform Act* that would have allowed the Minister to exempt parts of the coast and lake margins from having strips created. Proposals to allow the sale of any existing marginal strips were also dropped.

## Conservation Amendment Act 1996

In 1993 the government moved to allow the leasing and licensing of marginal strips as an alternative to the sale proposals abandoned in 1990. By leasing land or licensing any structure or activity on a marginal strip, the activity could legitimately continue and the Minister of Conservation could control it. The arrangement could apply to holiday baches, boat-sheds and jetties and also hydro dams and lakes, wharves at ports, farm or forest blocks. These proposals were widely criticised by citizens again fearing popular beaches and riverbanks would be privately controlled and the public excluded from them. Parliament eventually passed the *Conservation Amendment Act* in 1996. It deals with leasing and licensing of marginal strips in Part IIIb "Concessions". The 1996 amendment contained an array of restrictions of activities by a lessee that would interfere with public access (such as planting trees or erecting buildings that could be built elsewhere). Any leasing or licensing arrangements must be publicly notified for public submissions.[37] The Act has functioned quietly without the loss of public rights that its oponents had feared.

## Conclusion

Since 1840 the Crown has withheld land along water margins from sale for a variety of reasons. In the half century after the Treaty of Waitangi, vast areas were alienated to private ownership but there was no general requirement for reserving chain - wide strips along the coastline or along riverbank or lake margins. The strips reserved were gradually invoked, born from necessity, to facilitate fair land settlement and eventually were adopted as national requirements in the *Land Acts*.

The river and lake widths prescribed in the *Land Act* 1892 remained the law for over five decades of settlement. The Lands and Survey Department addressed control problems by eventually deciding the strips were river-bank reserves, not roads, so the Crown controlled them. The Courts established that riverbank roads, or reserves were not ambulatory. Reserves along rivers less than 33 feet wide were at the discretion of the surveyor.

Reserving was first only along the coast and navigable rivers, then rivers over 33 feet wide and currently on streams with beds 3 metres wide. These reservations have been mostly from rural Crown land, and unrelated to the lot areas. The scope for land to be reserved from sale has increased as more and smaller streams had to be considered. The public has no legal right of entry to unalienated Crown land but as the Crown alienates land, it must create marginal strips; thus, it creates more public access.

Section 58 of the *Land Act* 1948 applies only to surveys of Crown land since 1948. Similarly, s24 *Conservation Law Reform Act*, creating ambulatory strips, applies only to rivers, lakes and coastal margins of Crown alienations, since 1990. This is probably not a lot of land. Unfortunately there is no certainty for the public about where they might go without trespassing. The strips' existence and boundaries are uncertain, especially for these post-1990 ambulatory strips that are not depicted on maps.

More marginal strips are possible, because more Crown land is being alienated, and also because of the *Conservation Law Reform Act* definition of river-bed. In the future, the amount of water margin land available for public access will depend on the policies of the Department of Conservation. Some strips, or parts of them, might be leased, or their use licensed to adjacent land owners and managed privately. However, restrictions for the public are likely to apply only to small portions of the coast or rivers. Restricting leases are unlikely for land that has demand for access or recreation. There is now more land legally available for public access than at any time in the past. It is ironic that more legal access to and along waterways is created for the public as more Crown land is sold or leased to private enterprise.

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## Endnotes

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## Biographical Notes

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*This paper is based on research for Chapter 3 of his MSurv thesis.*