

10 August 2005

File: F108-02/TM

Kristin Philbert
Ministry of Fisheries
PO Box 1020
WELLINGTON
kristin.philbert@fish.govt.nz

Tena koe

Review of Sustainability Measures and other Management Controls for the 2005-06 Fishing Year

Introduction

This submission is from Te Ohu Kai Moana (Te Ohu) in response to the Ministry of Fisheries (MFish) Initial Position Papers (IPPs) entitled:

- *Review of Sustainability Measures and Other Management Controls for the 2005-06 (1 October) Fishing Year*, dated 30 June 2005. In particular this submission addresses the Kaipara Harbour Fishstocks including Flatfish (FLA 1), Grey Mullet (GMU) and Rig (SPO1) ; and
- *Review of Sustainability Measure and Other Management Controls for Kahawai for the 2005-06 (1 October) Fishing Year*, dated 8 July 2005.

This submission does not comment on the regulatory proposals for:

- beach-cast seaweed;
- registration of vessels authorised to fish for Southern Bluefin Tuna;
- inclusion of Kingfish on the Sixth Schedule of the Fisheries Act 1996.

We have viewed a draft of the SeaFIC submission and accept that any concerns we have in this regard are more than adequately covered in their submission.

It also does not comment on the proposed measures to the inshore species of Elephant fish (ELE 3 & 5) and Snapper (SNA8); and deep-sea species including Hake (HAK 7) and Hoki (HOK 1). Te Ohu Kai Moana has forwarded a separate submission on those fishstocks.

This submission is in two parts. Part One deals with over-arching policy issues raised by the proposals contained in the IPPs.

Part Two includes submissions on:

- Kaipara harbour stocks
- Kahawai.

This submission supports the submissions made by the Seafood Industry Council and Aotearoa Fisheries Limited and is designed to supplement those submissions as well as clearly state te Ohu Kai Moana's position.

Executive Summary

Key Concerns

Te Ohu has a number of key concerns about the IPPs for the Kaipara Harbour and Kahawai stocks, and the eroding effect of a number of relevant policy issues on the Fisheries Settlement. In particular we are concerned about the:

- reallocation of TAC shares between sectors;
- inadequate process and lack of objectivity in assessing management options;
- inconsistency with the SOI and objectives-based management;
- inappropriate use of information;
- urgent need to improve management of the recreational fishery;
- need to improve customary estimates and allowances.

This submission is based predominantly on the perspective of protecting the value of the compensation provided in the Fisheries Settlement between Iwi/Maori and the Crown. The agreements contained in the Fisheries Settlement validated the QMS as the only legitimate and lawfully appropriate regime for the sustainable management of commercial fishing in New Zealand¹. Hence Te Ohu supports all measures that protect sustainability through the QMS and that maintain the integrity of the Fisheries Settlement.

The Settlement is comprised of both customary commercial and non-commercial rights along with an obligation on the Crown to provide for the input and participation of Iwi/Maori into fisheries management decision making. We also acknowledge that Maori as individuals may harvest under the recreational regime, as can all citizens and that this is a "privilege" subject to Article I and Article II rights and obligations.

Summary of submissions

Te Ohu Kai Moana –

1. disagrees with and objects strongly to any attempt to reallocate TAC shares between sectors or within sectors (including using the utility approach or a non-proportional strategy) in a way that erodes the value of the fisheries settlement with iwi/Maori;

¹ See our submission on Kingfish in Appendix 1.

2. disagrees with any process that distorts the presentation of the relevant issues, range of options and their implications to the Minister that are procedurally invalid and have no sustainability basis;
3. notes that the proposals contained in these IPPs appear to be inconsistent with the MFish SOI which signalled a move to objectives-based management;
4. recommends rescoping the problems for the Kaipara harbour and Kahawai stocks and re-exploring the broad range of issues and measures that could be taken using an objectives-based management approach;
5. recommends that these shared fisheries might more productively be progressed as important case studies through objectives-based management plans as proposed in the SOI;
6. disagrees with the way anecdotal information is used in the IPPs to support particular management options that cannot be justified on sustainability grounds;
7. disagrees with the inconsistent application of the MFish policy on the use of available information;
8. reminds MFish and Minister that as we approach the problem of competition for limited resources they must balance the Treaty obligations when operating the Articles of the Treaty of Waitangi;
9. recommends that there is an urgent need to design systems and implement processes that provide for improved performance from the recreational sector. This includes the need for a robust and workable reporting programme to provide the required inputs into the stock assessment and sustainability measures decision making process;
10. recommends that where the need for a reduction in the TAC is identified in order to achieve sustainability objectives, sensible and consistent bag and size limits are set for relevant fishstocks to enable the recreational sector to contribute to the rebuild of those fish stocks;
11. disagrees with the MFish policy on estimating customary catch (based on poor information derived for recreational catch) and notes that the policy has been applied inconsistently;
12. recommends improved methods and information be developed to estimate and allocate the customary allowance;
13. supports option one (i.e. status quo) for Rig (SPO1) in conjunction with recommendations above;
14. disagrees with all non-proportional options and recommends that the status quo is retained for Mullet (GMU1) in conjunction with recommendations above;
15. disagrees with all proposed options and recommends that the status quo is retained for flatfish (FLA1) in conjunction with recommendations above;

16. supports option one (status quo) for all Kahawai stocks until the updated information is available for the 2007 stock assessment;
17. recommends that any TAC reductions must firstly be based on demonstrated sustainability concerns and shared equally between the commercial and recreational sector through catch limits and restraints.

Once again thank you for the opportunity to comment on the IPP dated 1 July 2005. We would be happy to discuss any question that you may have in relation to this submission at the earliest possible opportunity.

Naku noa, na

Craig Lawson
General Manager Policy

Key concerns and submissions

1 Reallocation of sector shares

You will be aware that in 1997 Te Ohu Kai Moana was a party to the Court of Appeal case² surrounding the reduction of sector group shares in the Snapper (SNA8) fishery. Unlike the Snapper fishery in 1997 the Ministry seems to have provided no *bona fide* efforts to present proposals to constrain recreational fishing through the lowering of bag limits or setting of minimum legal size for the Kaipara harbour and Kahawai stocks. The judgement was very clear on this point stating:

“we are satisfied from the evidence that the Minister has made bona fide efforts to constrain recreational fishing. Bag limits have been substantially reduced over recent years and the minimum legal size for snapper was quite recently increased from 25cm to 27cm. In addition, the Minister has forecast further work in this area which satisfies us that he is very much alive to the need to restrain recreational fishing in a way which seeks to prevent the commercial sacrifice being caught on recreational hooks...the Minister must act reasonably to seek to stop the saving resulting from TACC reductions being lost to recreational fishing”

Hence we are concerned that no such measures have been proposed in the IPPs to address this apparent inequity, which has the affect of reallocating shares between sectors.

In addition to this we also made a submission to MFish regarding the introduction of Kingfish into the QMS on 1 October 2003 (see Appendix 1). In that submission we discussed in detail our concerns regarding the consequences of attempting to reallocate shares between sectors using the “utility approach” with the end result being an erosion of the rights secured and guaranteed under the Fisheries Settlement. Indeed the IPP itself points out the Snapper lessons³ specifically:

“...case law has identified that:

- *Where commercial landings are reduced for sustainability reasons, reasonable steps should be taken to avoid the reduction being made less effective because of increased fishing by non-commercial stakeholders; and*
- *It is not unreasonable for commercial and recreational fishers to share some of the “pain” from a reduction in the TAC”*

Directly after making these important judicial decisions known in the IPP the following section then goes on to dismantle them by describing the “utility approach” which fails to address the inequity of reallocating sector shares from the commercial to the recreational sector. This approach has the effect of devaluing the ITQ contained in the fisheries settlement without compensation.

Te Ohu has also commented on the utility approach to allocation of the TAC in relation to Kahawai entering the QMS on 1 October 2004. Furthermore, we have watched with considerable bewilderment as the commercial allocations were reduced by 15% during the QMS introduction process while the recreational sector have failed to contribute any measures (theoretical or real) to constrain catch. Te Ohu see the current proposal as a further attempt to reallocate up to an additional 15%⁴ across

² Treaty of Waitangi Fisheries Commission v Minister of Fisheries & CEO Ministry of Fisheries CA83/97

³ Page 13, Paragraph 63 points d) and e) of the Kahawai IPP.

⁴ See in particular Grey Mullet proposals page 97 of the IPP

these stocks to the recreational sector, given the lack of restraining measures on recreational fishers, at the expense of the commercial sector.

Submission

- Te Ohu Kai Moana - disagrees with and objects to any attempt to reallocate TAC shares between sectors or within sectors (including using the utility approach or a non-proportional strategy) in a way that erodes the value of the Fisheries Settlement with Iwi/Maori.

2 Inadequate process and lack of objectivity

This is not the first time we have provided a submission on the Kaipara Harbour. Our earlier comments and recommendations to the Kaipara Harbour Sustainable Fisheries Management Study Group remain relevant (see Appendix 2). In that submission we provided a broad range of recommendations that we considered the proposal would benefit from to ensure that the value of the Fisheries Settlement would not be unjustifiably eroded, and to ensure objectivity.

There are two key points that we wish to reiterate in relation to the Kaipara. Firstly, the process seems to have been undermined by political influence. There is an established legitimate process within MFish (i.e. the research and stock assessment working groups) to objectively identify stocks with sustainability concerns. While we acknowledge that the Minister has the discretion to request a review, this process is also a means by which MFish provides for the fisheries settlement input and participation obligation to allow iwi/Maori to engage in the decision making. Once these stocks have been identified by the working groups they are prioritised in order of seriousness to create a basis for determining which stocks will be review given the limited resources available to MFish. It is important then to note that this process addresses both legitimate sustainability concerns and the input and participation obligation. In the case of both the Kaipara and Kahawai stocks no such objectivity has been demonstrated in these IPPs, there are no demonstrated sustainability concerns identified by the working groups and the Minister's request for a review of these stocks has subverted the prioritisation process.

Second, the proposals in the IPP do not provide an objective analysis of the reasonable range of measures together with advice about the individual and cumulative effect of such measures being implemented. Referring again to the direction provided in the Snapper judgement where it states:

"All we wish to say for the future is that the Minister would be wise to undertake a careful cost/benefit analysis of a reasonable range of options available to him in moving the fishery towards MSY. If the Minister ultimately thinks that a solution having major economic impact is immediately necessary, those affected should be able to see, first, that all other reasonable possibilities have been carefully analysed, and, second, why the solution adopted was considered to be the preferable one."

Te Ohu does not see how fishstocks with no demonstrated sustainability concerns can arrive at this stage of the review process with such limited consideration of management options and their associated consequences. We can therefore only conclude that invalid procedure has undermined objectivity in relation to these fishstocks.

Submission

- Te Ohu Kai Moana - disagrees with any process that distorts the presentation of the relevant issues, range of options and their subsequent consequences to the Minister that are procedurally invalid and have no sustainability basis.

3 Inconsistency with SOI and Objectives-Based Management

Our submission⁵ on the *Ministry of Fisheries Stock Strategies Consultation Document 2005/06* dated 10 December 2001 endorsed the overall rationale proposed for the future evolution of fisheries management in New Zealand including the following:

- increase transparency by detailing management initiatives applied to each fishery, and their costs;
- ensure regulatory interventions are justified, and remove those no longer required;
- move to objectives-based fisheries management underpinned by the assessment and management of risk;
- monitor performance of management against objectives; and
- clarify Government and stakeholder roles and responsibilities for sustainability and utilisation of fisheries resources.

The Statement of Intent 2005/08 (SOI) similarly provides for “objectives-based” management with the following key elements:

- setting objectives that meet or exceed any applicable standards and fisheries outcomes;
- using risk assessment and analysis of costs and benefits to identify key management issues and evaluate alternative implementation strategies
- prioritising allocation of Ministry resources;
- specifying services and management measures, and assigning responsibility for their delivery and implementation;
- providing a clearer basis for monitoring and reporting on the performance of fisheries management.

To achieve the shift to this objectives-based management the Ministry has signalled that it will:

- work with tangata whenua and stakeholders to develop guidelines for the development of management plans, including a process to manage competing or irreconcilable objectives;
- develop 2-3 management plans in 2005/06 as ‘proof of concept’ and seek approval for them as fisheries plans under s11A of the Fisheries Act 1996;
- evaluate tangata whenua–developed and stakeholder developed plans for possible approval under s11A of the Fisheries Act 1996;
- recommend the application of management measures and delivery of fisheries services specified in management options for input into the Ministry priority-setting processes for expenditure of resources.

Given the potential for reallocation to occur with the Kaipara harbour and Kahawai stocks (and indeed the snapper fishery) as well as the procedural influences operating (discussed above), we consider that these shared fisheries would be ideal candidates for the first set of objectives-based management plans to provide a basis for ‘proof of concept’. Our 2001 submission on the Kaipara Harbour *Fishing for the*

⁵ Te Ohu Submission dated 20 February 2005.

Future consultation document provided a range of recommendations consistent with the objectives-based approach.

In relation to Kahawai, rather than attempting to impose a solution (i.e. manage the stocks above Bmsy and reallocating commercial sector shares to the recreational fishers) we suggest that the objectives-based approach, through the development of a shared fishery management plan would be a more consistent approach with the SOI.

Submissions

Te Ohu Kai Moana –

- notes that the proposals contained in these IPPs appear to be inconsistent with the MFish SOI which signalled a move to objectives-based management;
- recommends rescoping the problems (in the Kaipara harbour and Kahawai stocks) and re-exploring the broad range of issues and measures that could be taken using an objectives-based management approach to address the problems identified;
- recommends that these shared fisheries might be more productively progressed as important case studies through objectives-based management plans as proposed in the SOI.

4 Inappropriate use of information and application of precaution

This brings us to the next important point about the use of information in the IPPs, particularly in the case of the Kaipara stocks but also in the Kahawai stocks. MFish have relied on the presentation of anecdotal information provided by the local community and “some non-commercial fishers”, to create the impression of uncertainty in these fisheries. MFish have presented no anecdotal information from the commercial sector and have not accorded correct weighting to the catch sampling information which has been reviewed by the Pelagic working group – both of which do not concur with the recreational view of a decline.

We have two important points to make in this respect. First, MFish has developed a generic policy for the hierarchy of information and how it should be applied in the setting of TACs (see table 1 top of next page), yet their application of the available information is inconsistent with their own policy. Clearly the information adopted in the plenary report is accorded greater weighting in the MFish policy; in fact it provides the basis for TAC setting. Whereas anecdotal information particularly if it has not been adopted in the plenary report should be taken into account but not provided the same weighting. However, it is clear to us that greater weighting has been placed on the anecdotal information.

Table 1 MFish Hierarchy of Information Policy

1 Information about status of stock and estimates of available yield	Adopted in Plenary Report	Use as basis for setting TAC (subject to consideration of guidelines identified above – i.e. general statutory obligation and TAC options, etc)
	Not adopted in Plenary Report	Take information into account, but receive limited weighting

Table 1. Extract from the Statutory Obligations and Policy Guidelines contained in the IPP dated 13 February for eels entering the QMS (see table 2 page 14).

Second, the anecdotal information has been used as a rationale to support claims of uncertainty. This uncertainty is then used to justify the proposed precautionary options.

This situation combined with our concerns about political influence and lack of objectivity (discussed above) lead us further to the opinion that reallocation in these IPPs may already be a *fait a compli*.

Submissions

Te Ohu Kai Moana –

- disagrees with the way anecdotal information is used in the IPPs to support particular management options that cannot be justified on sustainability grounds.
- disagrees with the inconsistent application of the MFish policy on the use of available information.

5 Urgent need to improve management of the recreational fishery

The recreational sector is the only sector that enjoys all the privileges of fishing and yet has no responsibilities towards the sustainable management of New Zealand's fisheries, other than to comply with rules set by MFish. Therefore in exercising his duties under Article I of the Treaty of Waitangi the Minister must take steps to ensure the sustainability of fisheries is assured. However, after that the Minister must consider his responsibilities under Article II to protect the collective rights of iwi and hapu particularly if they have been enshrined in a settlement such as the Fisheries Settlement, and give those rights priority before making resources available to citizens under Article III of the Treaty. Te Ohu provided this information to the Local Government and Environment Select Committee as part of our submission on the Marine Reserves Amendment Bill and more recently as part of our Kingfish submission (see Appendix 1).

A matter of considerable concern to Te Ohu is the lack of any type of reasonable constraint imposed on citizens under Article III of the Treaty of Waitangi by the Minister. **New Zealand's population is projected to reach 5.05 million by 2051**, an increase of almost one million or 24 percent from the estimated resident

population of 4.06 million at 30 June 2004⁶. Te Ohu agrees that the Minister should take population trends into account as part of his decision making process. Rather than seeking to provide preferential allocation of TACs to this sector he should be considering at what point and at what rate restraint must be applied. Unconstrained fishing by this sector will result in the following two consequences. First the fishing industry will be damaged and potentially destroyed if preferential allocation is allowed to continue in the direction that is proposed, and second, the sustainability of the fisheries will become threatened. In both scenarios the Article II rights secured in the Fisheries Settlement will be devalued. Therefore we consider that there is only one option. The Minister must commence a process that is designed to explore restraint options which are best suited to the full integration of the recreational sector into the QMS.

At present there is no integration between the poorly estimated recreational allowance and the input controls (i.e. bag and size limits). For full integration to occur the recreational sector would need to be moving in the direction of output controls, equivalent to those imposed on the commercial sector. Te Ohu considers that the approach being pursued by MFish will have the effect of reallocating sector shares in particular fisheries by placing further constraint on commercial fisheries without any equivalent constraint being placed on recreational fisheries. There is an urgent need to get recreational fisheries to provide catch information with a view to constraining overall catch.

The current system for gathering estimates of recreational catch is grossly inadequate. The surveys conducted to date are considered highly spurious even by MFish. However, given that it is the only information available upon which to base an estimate it is utilised in the assessment process.

Therefore as discussed earlier, where is necessary to reduce the TAC in particularly fisheries, it is important to balance TAC/C reductions with *bona fide* efforts to constrain recreational catch, alongside TACC reductions. As those efforts in the recreational sector are currently limited to bag and size reductions, we consider it is time to address the question of what are reasonable daily bag limits and size restrictions for each of the species under review.

Submissions

Te Ohu Kai Moana -

- reminds MFish and Minister that as we approach the problem of competition for limited resources they must balance the Treaty obligations when operating the Articles of the Treaty of Waitangi.
- recommends that there is an urgent need to design systems and implement processes that provide for improved performance from the recreational sector. This includes the need for a robust and workable reporting programme to provide the required inputs into the stock assessment and sustainability measures decision-making process.
- recommends that where the need for a reduction in the TAC is identified in order to achieve sustainability objectives, sensible and consistent bag and size limits are set for relevant fishstocks to enable the recreational sector to contribute to the rebuild of those fish stocks.

⁶ Statistics New Zealand Web-site.

6 Need to improve customary estimates and allowance

As discussed the recreational catch estimates and allocation policy are urgently in need of improvement. In addition to the issues raised above, the customary estimate and allowances are based on a proportion of the recreational estimates/allowances (see table 2).

MFish Customary Catch and Allocation Policy

Existing estimates (customary permits/authorisations; information provided by tangata whenua, etc)	Use as basis for determining current customary catch
No estimates but known to be of significant importance to Maori above the level of recreational take	Catch level above the known recreational catch included
No estimates but known to be of importance to Maori	Catch level similar to known recreational catch included
No estimates but know customary catch (and stock of no particular importance to Maori)	Catch level half of known recreational catch included
No known customary catch	No catch level included

Table 2. Extract from the Statutory Obligations and Policy Guidelines contained in the IPP dated 13 February for eels entering the QMS (see table 3 page 16).

Te Ohu considers this method of establishing catch and then determining allowances for customary fishing unacceptable because it is premised on the assumption that the recreational information is valid or reliable. To make matters worse, MFish is applying this policy inconsistently.

For example the final advice paper stated *“The level of customary harvest becomes important if you decide to set TACs that reduce existing use in the fishery⁷.”* It then goes on *“As a matter of policy MFish recommends that customary use/allowances are not constrained or reduced in the circumstances of reduced TACs and the burden of reduction on commercial and recreational fishers is therefore proportionally higher⁸”*

When Kahawai first entered the QMS the IPP contained a recommendation that the customary allowance should be set at 50% of the recreational allowance based on it being *“an important customary species⁹”*. Despite that the Minister decided to set the customary allowance at 550 tonnes in KAH1, whereas the recreational allowance was set at 1865. The customary allowance was therefore set at approximately 29.5% (around a quarter of the recreational allowance).

In this more recent IPP, MFish proposes an option to reduce the customary allowances again by a further 10% (i.e. to 495 tonnes) despite the assessment that it is *“known to be a species of customary importance to Maori¹⁰”*. If MFish were to follow their policy the customary allowance should be set at 932.5 or half of the recreational allowance and not subject to reduction because of TAC reductions.

⁷ See paragraph 209, page 84.

⁸ Paragraph 210, page 84 of the Final Advice Paper dated 29 June 2004.

⁹ See paragraph 42, page 74 of the IPP dated 12 January.

¹⁰ See paragraph 67, page 14 of the Kahawai IPP dated 8 July 2005.

Te Ohu proposes that there is a much better way to arrive at the customary estimates and therefore set improved allowances.

We acknowledge that regulation 27 of the Amateur Fishing Regulations, which provides a temporary measure to harvest for Hui and tangi, has no reporting requirements. However, we are aware that (especially in the South Island) the customary regulations have been in operation for some time. Given this, we do not understand why there is no information about customary catch in the recent IPPs.

We are also aware that the framework for customary fishing is incomplete in its implementation, particularly in the North Island. However, we suggest two possible avenues for establishing a customary allowance on a temporary basis until the customary framework is fully implemented throughout New Zealand:

- first, working directly with each of the Recognised Iwi Organisations having an interest in each QMA, backed up with additional work through the relevant Iwi forums that have been established under the MFish Treaty Strategy (which we assume would involved those organisations) would be a good way to start;
- second, in our submission on North Island eels entering the QMS we recommended that better information is readily available to estimate catch and set allowances using the method outlined in table 3.

	Estimating Customary Fishing for Hui & Tangi purposes
Known available information	Number and whereabouts of Marae available from Te Puni Korkiri
Initial Estimate Formula	<ul style="list-style-type: none"> • Marae per QMA x • Average number of hui or tangi per annum x • Consumption estimate per hui or tangi
Consumption Estimate	Some information available from submissions and other surveys undertaken by MFish
Follow up Survey Verification	<ul style="list-style-type: none"> • Average number of hui or tangi per annum • Consumption estimate

Table 3. Showing how information can be combined and improved to estimate customary catch and needs.

Te Ohu would be happy to work with the Ministry to develop these proposals further.

Submissions

Te Ohu Kai Moana –

- disagrees with the MFish policy on estimating customary catch (based on poor information derived for recreational catch) and notes the inconsistent application of that policy.
- recommends improved methods and information be developed to estimate and allocate the customary allowance.

7 Comments on specific IPP proposals

7.1 Kaipara Harbour (FMA1) Fishstocks for Review

Te Ohu has little more to say about the Kaipara harbour stocks that we have not already covered in this submission. We refer you again to our submission on the Kaipara harbour consultation document *Fishing for the Future* (see Appendix 2). We consider that the local access and local depletion issues that have resulted in spatial conflict would be more constructively addressed in an objectives-based management plan for the harbour (as recommended earlier in this submission).

A reduction in the TAC will do nothing to address the problem in the Kaipara, which is really about local access and local depletion. We consider that there is no sustainability basis to justify the proposed reductions, that they are inappropriately arrived at and that they will result in devaluing the integrity of the QMS and the Fisheries Settlement if pursued. We therefore provide specific recommendations to maintain the status quo on these species until improved information becomes available and the objectives-based management plan is developed.

Submissions

Te Ohu Kai Moana –

- supports option one (i.e. status quo) for Rig (SPO1) in conjunction with recommendations above;
- disagrees with all non-proportional options and recommends that the status quo is retained for Mullet (GMU1) in conjunction with recommendations above;
- disagrees with all proposed options and recommends that the status quo is retained for flatfish (FLA1) in conjunction with recommendations above.

7.2 Kahawai (KAH 1-10)

The setting of sustainability measures for Kahawai stocks as they were introduced into the QMS on 1 October 2004 resulted in the Minister deciding to reduce both commercial and recreational catch limits by 15% from the estimated catch levels. TACs totalling 7,612 tonnes were set that were 15% less than the level of use prior to introducing Kahawai into the QMS. However, despite the Minister's initial decision of 10 August 2004 to effect the reductions in both the recreational and commercial sector he then decided not to implement bag limit reductions that he had initially anticipated while better information about recreational catch was being collected. Hence, the reductions fell solely on the commercial sector in the end.

The Recreational Technical Working Group recommended that the recreational harvest surveys from 1996 to 1993/94 should be used only with the following qualifications:

- they may be very inaccurate;
- the 1996 and earlier surveys contain a methodological error;
- the 2000 and 2001 estimates are implausibly high for many important fisheries;

In addition “the recreational claims of declining sizes of Kahawai are not supported by catch sampling and age structure data from the recreational fishery, which has been closely monitored since 2000-01. The size and age of the fish sampled has remained relatively constant since 2000-01 with a broad age structure evident in the catch. These results are not consistent with a rapid decline in abundance.”¹¹

There appears to be no information and evidence available to support the assumption of a decline in the Kahawai fishery. In fact MFish report that Kahawai stocks are likely to be at or above Bmsy or moving in that direction.

This current review for the 2005-06 fishing year proposes 2 options:

- (1) status quo; and
- (2) 10% TAC/TACC reduction for all Kahawai stocks so as to manage stocks above a level that will produce MSY.

It appears, given the lack of any serious consideration of lowering recreational bag limits that the Ministry is proposing to further reduce the commercial catch by another 10%. Te Ohu consider that this will result in a reallocation from the commercial sector to the recreational sector, based primarily on what we consider is unbalanced anecdotal information and inappropriate process.

Current amateur bag limits for Kahawai are based on a mixed bag limit of 15 -20 per person per day. If Kahawai is the only species taken, then up to 20 may be taken per person per day. There is no minimum legal size restriction in place. If there is indeed a sustainability issue, and given the 15% reduction already born by the commercial sector, Te Ohu questions whether 20 Kahawai per person per day is reasonable in this context.

Again we refer to the direction provided by the Courts in 1997 Snapper case and question whether MFish is acting reasonably in pursuing a policy which will result in the saving resulting from the 2004 reductions of 15% together with the current proposals of an additional 10% TACC being caught on “recreational hooks”. There appears to be an absence of any *bona fide* attempts to constrain recreational catch through equivalent reductions in size or bag limits.

Submissions

Te Ohu Kai Moana –

- supports option one (status quo) for all Kahawai stocks until the updated information is available for the 2007 stock assessment.
- recommends that any TAC reductions must firstly be based on demonstrated sustainability concerns and shared equally between the commercial and recreational sectors through catch limits and restraints.

8 Concluding comments

Our previous submissions are highlighted in this submission because we consider that MFish officials and indeed the Minister have signalled in this current series of IPPs their intention to pursue an approach that will have the effect of reallocating shares between sectors through various strategies. This concern is also apparent in the snapper fishery for which we are providing a separate submission.

¹¹ See paragraph 24, page 8 of the Kahawai IPP dated 8 July 2005.

As pointed out in our earlier submission the use of a utility approach (or any other approach that does not serve to further the agreements between Iwi/Maori and the Crown in the Deed of Settlement in a just and honourable way) is contrary to all Maori understandings of the appropriate and lawful operation of the QMS. If allowed to continue this approach will result in the erosion of ITQ as a perpetual property right and hence the compensation provided in the 1992 fisheries settlement will deliver a further Treaty breach on the part of the Crown if pursued.

Te Ohu considers that any reductions to the TAC and hence the TACCs must firstly be based on demonstrated sustainability grounds. Beyond that, reductions must be made on a proportional basis between the commercial and recreational sectors that must both share and demonstrate responsibility for the management of New Zealand's fisheries. Therefore where there is shown to be a sustainability concern with particular fishstock and a TAC reduction is necessary, serious consideration must be given to bag limit reductions so that recreational catch limits can be effectively constrained.

Appendix 1

Friday, 20 June 2003

File: Q108 - 14 - 04/TM

Randall Bess
Ministry of Fisheries
P.O. Box 1020
Wellington

Tena koe Randall

Te Ohu Kai Moana Submission on the Kingfish Initial Position Paper dated 20 May 2003.

Thank you for your letter dated 14 May 2003, inviting Te Ohu Kai Moana to comment by way of submission on the enclosed Initial Position Paper discussing management options for Kingfish as it enters the QMS on 1 October 2003.

Te Ohu Kai Moana supports all measures put in place, or that can be put in place, to protect the integrity of the Deed of Settlement and the Treaty of Waitangi Fisheries Claims Settlement Act 1992. This Settlement is comprised of both customary commercial and non-commercial rights – although Maori as individuals may also harvest under the recreational regime, as with all citizens.

Summary of Main Points:

Te Ohu Kai Moana -

1. Sees this proposal as a major shift in both policy direction (i.e. from the “claims based allocation model” to the “utility based allocation model”) and methodology that may have significant implications for the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Settlement). This applies to both the ongoing implementation of the Settlement “in good faith” and the legitimate expectations (as in common law) Maori have of what was envisaged in that settlement.
2. Strongly suggests that the proposed change is of such significance as to warrant full and proper consultation on both the shift in policy direction and methodology first, as separate issues, before being applied to the Kingfish fishery or any other specific fishery.
3. Reminds the Minister and your officials of the agreed protocol regarding the Crown’s Obligations to Maori resulting from the actions of the Crown in the Foveaux Strait Dredge Oyster Fishery Court Case. We therefore suggest that Minister instruct officials to revisit the policy statement relating to the

Crown's obligations to Maori and specifically in regard to the continuing relationship between the Treaty of Waitangi Fisheries Commission and the Crown¹².

4. Sees this shift in policy direction as a means to undermine the integrity of the Settlement to provide for new uses in the marine environment (i.e. to provide recreational fishers with priority over Article II Treaty Rights being both customary non-commercial and commercial rights as specified in sections 9 and 10 of the Settlement Act) and therefore an act of "bad faith" on the part of the Crown.
5. Is of the view that there is no place for the use of non-market valuation or allocations based upon estimates of utility within the operation of the QMS.
6. Sees the use of utility determining allocations within the TAC as contrary to all Maori understandings of the appropriate and lawful operation of the QMS in 1992 and subsequently. Its use undermines the value of ITQ and the integrity of the QMS. Accordingly, the Minister should reject all advice based upon this approach.
7. Suggests that the recreational share of the TAC and the TACC should be based on best estimates of average historical catch by the recreational and commercial sectors.

Introduction:

Te Ohu Kai Moana has studied the 64 page Kingfish initial position paper (IPP) and the 115 page Report by The South Australian Centre for Economic Studies on the Value of New Zealand Recreational Fishing. TOKM is alarmed and disappointed at the appearance of the so-called 'utility based allocation' approach to setting allocations under a TAC. Te Ohu Kai Moana records its strongest opposition to the utility-based allocation model set out in the IPP.

Te Ohu Kai Moana has never encountered the 'utility based approach' previously. It has emerged for the first time in this IPP. We note the current Fisheries Act was passed 7 years ago and the Quota Management System (QMS) has been in place for 17 years. In all that time no one has previously suggested that the Fisheries Act should be interpreted in this manner. There is a good reason for that.

Although your officials go to considerable lengths in an attempt to show that the utility approach is not prohibited by the Fisheries Act 1996, it is clear that the main foundation for it lies in MFish's Strategic Plan, rather than the Fisheries Act itself. *"The objective of maximising utility reflects the goal of MFish's strategic plan to obtain best value from fisheries management."*

The IPP places the 'utility based approach' in opposition to the option of a 'claims based allocation'. Te Ohu Kai Moana submits that neither of these options properly describes the approach you should take. However, the so-called 'claims based approach' is more correct than the other.

¹² See Appendix 1

Problems with the ‘Utility Based Approach’

The SeaFIC submission describes the utility-based allocation model as flawed in both its policy position and its application. Te Ohu Kai Moana endorses the SeaFIC critique of the application of this approach. However, even in the unlikely event that some of the problems with the non-market valuation methodologies employed were solved over time, Te Ohu Kai Moana considers the approach to be wrong in principle and wrong in law. The SeaFIC submission submits,

“that the utility allocation model is inconsistent with the Treaty of Waitangi commercial fisheries settlement. Reducing the commercial share of available yield in favour of the recreational sector suggests a priority of recreational interests over the Crown’s obligation to protect the value of the commercial fisheries settlement.”

We strongly concur with this statement in the SeaFIC submission and devote the bulk of this submission to this single point, namely that the adoption of the utility allocation model will undermine the integrity of the Deed of Settlement. Consequently, we consider that it is not a model that can be adopted, acting as you have noted elsewhere as guarantor of the Settlement. Nor would a move to do so represent the Government acting in “good faith”.

Your Responsibilities Under Section 5 of the Fisheries Act 1996.

Paragraph 41 of the IPP contains your officials’ interpretation of section 5 of the Fisheries Act.

“41 The Act is to be interpreted, and all persons exercising or performing functions, duties, or powers under the Act, are required to act in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (s 5(b)). This requirement is intended to further the agreements expressed in the Deed of Settlement referred to in the Preamble of the Settlement Act. In particular, Maori non-commercial fishing rights continue to give rise to Treaty obligations on the Crown.”

The second sentence of the paragraph above is a reference to section 3 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:

“3. Interpretation of Act generally – It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement referred to in the Preamble of this Act.”

There is therefore a straight line that connects section 5 of the Fisheries Act to the Deed of Settlement; and in doing so to the entirety of the agreements embodied in that Deed and not just those agreements that related to the development of customary fishing regulations. We disagree with the view of your officials that it is only Maori non-commercial rights that continue to give rise to Treaty obligations on the Crown. Our view is that you have an ongoing responsibility to further the entirety of the agreements in the Deed of Settlement. If you cannot further those agreements, your minimal responsibility is to uphold them. In no circumstances, is it safe for you when exercising a discretion in your powers to undermine them.

Both the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act refer to the principles of the Treaty of Waitangi. ‘Good faith’ is a

common element in the versions of Treaty Principles produced by the Court of Appeal and the 'principles to guide handling of treaty claims' enunciated by the current Treaty Relations Minister, Margaret Wilson. Furthermore, the Deed of Settlement contains several references to 'good faith' and 'just and honourable'.

In section 4.2 of the Deed of Settlement, Maori gave an explicit endorsement of the QMS:

“Maori endorses the QMS and acknowledges that it is a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand.”

The primary currency of the Settlement of all Maori claims to commercial fisheries was and is ITQ. The interim settlement comprised 10% of all ITQ, Maori are entitled to receive 20% of new ITQ and the 1992 settlement facilitated the purchase by Maori of a 50% share of Sealord, a company with ITQ as its major asset.

The core of the agreement embodied within the Deed of Settlement is that Maori relinquish claims to commercial fisheries in exchange for a consideration mainly comprising ITQ within the QMS (the only 'lawful and appropriate' regime for the management of New Zealand commercial fisheries). The good faith responsibility of the Government is to conduct itself under section 5 in a manner that furthers that agreement and does not debase it.

In particular, all those exercising or performing functions, duties and powers under the Fisheries Act must not act to destroy the value of ITQ or alter the QMS in a way that it is no longer an appropriate regime for the management of commercial fishing in Maori eyes. It is accepted at all times by Maori that ITQ must be utilised sustainably. TACC reductions necessary to achieve sustainability protect the value of ITQ (which is the net present value of all future ACE revenues).

The Deed of Settlement effected a number of changes to the Fisheries Act that signalled specific fisheries management actions requiring prior consultation with Te Ohu Kai Moana to ensure that they did not adversely affect the Settlement. The consultation requirements applied to sections 28B, 28D(2), 28W(3), 28ZE(3), 30, 46 and 86 of the Fisheries Act 1983. The 1996 Act replaced these specific consultation references with more general and flexible wording and a general duty under section 5.

Those legislative changes did not alter however either the agreements within the Deed of Settlement, or the ongoing relationship under the Deed between Maori and the Crown. The mutual obligations of the parties with respect to the Settlement were unchanged by the 1996 Fisheries Act. In fact, Maori interpret the purpose of that Act in the light of the preceding Deed.

Why 'Utility Based Allocations' are contrary to Section 5.

Within the QMS, Maori own various quantities of ITQ in all fish stocks. Te Ohu Kai Moana considers it would be contrary to the Deed of Settlement for the Crown to expropriate some of that ITQ and transfer it to another party without compensation. That conclusion applies whether the third party were another commercial fisher or a recreational fisher. Such uncompensated transfers were not envisaged as a part of the QMS in 1992 and have not been endorsed by Maori subsequently. On the contrary, Te Ohu Kai Moana vigorously opposed the proposed TACC reductions in

SNA1 in order to increase the recreational share in that fishery and was party to proceedings against the Crown on that basis.

Te Ohu Kai Moana explicitly rejects any proposition that there is recreational priority particularly over Article II Treaty Rights secured within the fisheries settlement as ITQ under a TAC. The QMS contained no such priority in 1992 when the Deed of Settlement was negotiated and no such priority has been inserted into the QMS with Maori agreement since that date.

For species entering the QMS, Maori are entitled to receive 20% of ITQ. Te Ohu Kai Moana is firmly of the opinion that the process of introduction is not to be used as an opportunity to apply a recreational priority at the threshold of the QMS that does not exist within the QMS. That would be an act of bad faith.

That act is what your officials are encouraging you to consider within this IPP. It is clear that they have put considerable thought into how you might achieve that action legally. We note that they draw your attention to the fact that PCH can be pro-rated downwards to fit within a sustainable TACC without such pro-ration giving opportunity for PCH holders to take legal action against you for any reduction. The advice appears to be that you might take advantage of such immunity to effect a transfer or "reallocation" of PCH to the recreational sector without facing SNA1 style proceedings. However, the effect on Maori of "transferring" PCH to recreational interests is identical to the effect of transferring ITQ from Maori to recreational interests without compensation.

Where your officials have been somewhat negligent in their advice to you within the IPP is by failing to point out the consequences of such a transfer for perceptions of your good faith. The integrity of the Deed of Settlement can be destroyed by actions that are lawful but dishonourable.

The Alternative to Utility Based Allocations

Paragraph 22 of the IPP begins with the statement that "*utility is the measure of social, cultural and economic value that flows from harvest of a resource.*" Utility is not a measure. Utility is individual and subjective; it can be revealed by the choices people make, but it is not measured. While it is reasonable for the Ministry to be concerned about value within the context of its strategic plan, that concern should be focussed upon the cost effective operation of the Ministry, the avoidance of value destroying regulations and so on. A concern about value does certainly not mean that the Ministry should commence the re-allocation of resources and rights between sectors or individuals on the grounds of perceptions of relative utility. Nor should this occur on the basis of population expansion when the context of a full and final settlement with Maori as a minority group is at risk of erosion.

Concepts of utility, often expressed in the phrase 'the national good', have been the driving force behind the expropriation of many Maori resources supposedly protected by Article II of the Treaty of Waitangi over the years. A reason why the QMS was endorsed by Maori as an appropriate and lawful regime for the sustainable management of commercial fisheries is that it is a regime that secures perpetual possession of ITQ. It is not a condition of the QMS that Maori only retain ownership of ITQ for as long as no one else claims to value it more highly.

In this instance your officials have drawn specific attention (paragraph 77) to population trends and in particular the growth of urban centres such as Auckland having a significant impact on particular fisheries. Providing recreational fishers with

an exclusive priority fishery on the basis of expanding population growth is not a legitimate reason for re-allocation of quota, nor a very practical sustainability measure unless you intend to place a simultaneous cap on population growth. Indeed this is a repeat of the tragedy of the commons scenario and has no end in sight unless you can devise a way of containing recreation take within an expanding population.

Furthermore, it is our contention¹³ that Article II Treaty Rights which include any settlement with the Crown such as the fisheries settlement must take priority over, and be protected from the encroachment of, all other forms of use. Here we are particularly concerned about the growth of the commercial charter-boat operations which have a potentially significant impact on the fishery while avoiding the costs and responsibilities that legitimate commercial fishers are subject to. We perceive this activity as belonging to the Article III category which has yet to be reconciled as with all other uses of the marine environment under the Oceans Policy framework.

It is one of the most basic elements of the QMS and a foundation stone of the Deed of Settlement that ITQ is secure from such expropriation and re-allocation. The integrity of the QMS requires that TACCs cannot be decreased so that recreational fishers can have a larger share of the resource. Once the QMS is in place, the only way of effecting that transfer in good faith is with proper consultation followed by full compensation. We repeat that we consider doing this at the point of establishing the QMS but without compensation as chicanery and not an act of "good faith".

Your own discussion document on recreational fishing policy ('Soundings') points out that recreational rights are not clearly defined. Let us re-iterate the position regarding recreational rights in 1992 – at least to the extent that such description can be widely agreed and was understood by Maori at the time. The recreational right is an individual right enjoyed by all citizens. It entitles individuals to fish in the sea subject to various regulatory restrictions about size limits, technology and season. Principled amongst these restrictions is a daily bag limit that demarks the maximum extent of the individual right. Recreational fishers are not guaranteed that they can catch that daily limit, neither are they guaranteed that they can catch the bag limit with a certain level of effort.

It is the Sovereign responsibility of the Crown under Article I of the Treaty of Waitangi to ensure that fisheries are managed sustainably. Allowing an ever-expanding population to harvest in an unconstrained manner will not result in the Crown meeting its obligations. In addition it is also the Sovereign responsibility of the Crown to maintain the Treaty Partnership by protecting the Article II Treaty Right before allocating any privileges to Citizens under Article III.

When species were introduced into the QMS, the Ministry estimated the level of recreational catch and an allowance for that quantity was made within the TAC. If there was an observed increase in recreational take, lower bag limits or other restrictions should be considered to constrain catch. As there is no recreational priority, the unconstrained expansion of recreational take within a fixed TACC can only be through the improper expropriation of ITQ, including ITQ received by Maori as a result of the Deed of Settlement.

Accordingly, TOKM concludes that the only allowance that should be made for recreational catch in Kingfish is based upon estimates of actual historic catch.

¹³ See Appendix 2 extract from Te Ohu Kai Moana's submission on the Marine Reserves Bill

Methodology

In relation to the recreational survey the Ministry of Fisheries appears to have completely ignored the extreme caution of the authors of the survey on page (i) and (ii) of the Executive Summary which states:

“Section 2 of this report discusses several matters of economic principle that need to be understood to interpret economic values for the purpose of formulating fisheries management policy.

Therefore, the Ministry of Fisheries needs to be extremely careful when they utilise the values of recreational fishing as estimated within this report. These values are *not* directly comparable to gross production commercial value – hence any policy decisions based on this would be misleading.”

We also point out that the recreational survey upon which the assessment is based has not been either peer reviewed or endorsed by the stock assessment working group. This is a further unusual departure from the normal practice of the Ministry of Fisheries in applying the best available information. It also leaves us somewhat bewildered and less than confident in the consultation process being followed.

This submission has focused on the underlying principles that should guide the Minister when introducing new species into the QMS in a manner that is consistent with the Deed of Settlement.

We have not included this submission any specific comments on the technical details associated with this species. However, we intend to do that after your early consideration of this submission. Te Ohu Kai Moana endorses the submissions made by the Seafood Industry Council, The Snapper 8 Company Ltd and Area 2 Inshore Finfish Company Ltd on the more specific aspects of the Kingfish fishery.

Once again, thank you for the opportunity to comment on the Kingfish Initial Position Paper dated 20 May 2003. We would be happy to meet with the Minister or the Ministry of Fisheries officials to discuss any aspect of our submission, and in particular to plot a way forward from here.

Naku noa, na

Craig Lawson
General Manager Policy

Appendix 1.

Policy statement from the Crown to the Treaty of Waitangi Fisheries Commission

The Crown affirms its commitment to the Deed of Settlement. The Crown also affirms its current policy that all commercial non-QMS species should be introduced into the Quota Management System as quickly as practicable.

In particular the Crown affirms its commitment to acquire 20% of those commercial species outside the Quota Management System upon, or before, the introduction of those species into the QMS and to deliver that 20% to the Treaty of Waitangi Fisheries Commission (the Commission) for Maori, no later than upon the introduction of those species into the QMS.

The Crown intends to implement such processes as are necessary to effect the introduction of all commercial non-QMS species into the Quota Management System as quickly as practicable. It accepts that it has an obligation to consult with the Commission on such processes, and on the timing of the introduction of species into the Quota Management System.

The rights of the Commission under the Deed of Settlement constitute a central part of the context in which the Crown consults on, and makes decisions about, the management of fisheries, in so far as such decisions would affect the rights of the Commission under the Deed of Settlement.

The Crown acknowledges the continuing relationship between itself and the Commission on behalf of Maori is a key aspect of the relationship between the Crown and Maori.

Appendix 2.

Extract from Te Ohu Kai Moana's submission on the Marine Reserves Bill

1.2 The Treaty of Waitangi

The relationship between Article I, II and III of the Treaty of Waitangi is at the centre of debate concerning all Government reforms that involve decision-making at both the policy reform and operational levels. This includes the development of the Marine Reserves Bill.

The Context of the Treaty Partnership

The principal parties to the Treaty are Maori and the Crown. The preamble of the Treaty outlines the context in which the 'increasing number of foreign nationals' were entering the country. Thus, the Crown and Maori agreed to extend citizen protection to the Tribes in light of the increasing amount of disorderly behaviour being experienced as a result of the influx of foreign visitors and the possibility of annexation by the French. Therefore, through the Treaty of Waitangi, Maori have a special partnership relationship with the Crown that is distinct and unique from that of general citizenship status. Part of the Treaty relationship involves a duty by the Crown and natural resource decision-makers to undertake active protection of the Article II rights of Maori. This includes both acknowledged existing settlements and future claims settlements.

A Framework for the Treaty of Waitangi

The Treaty recognises the rights and duties of the Crown, Maori and citizens and provides the framework within which these rights and duties can be applied. No one Article can be considered in isolation – the relationship between all three must be considered.

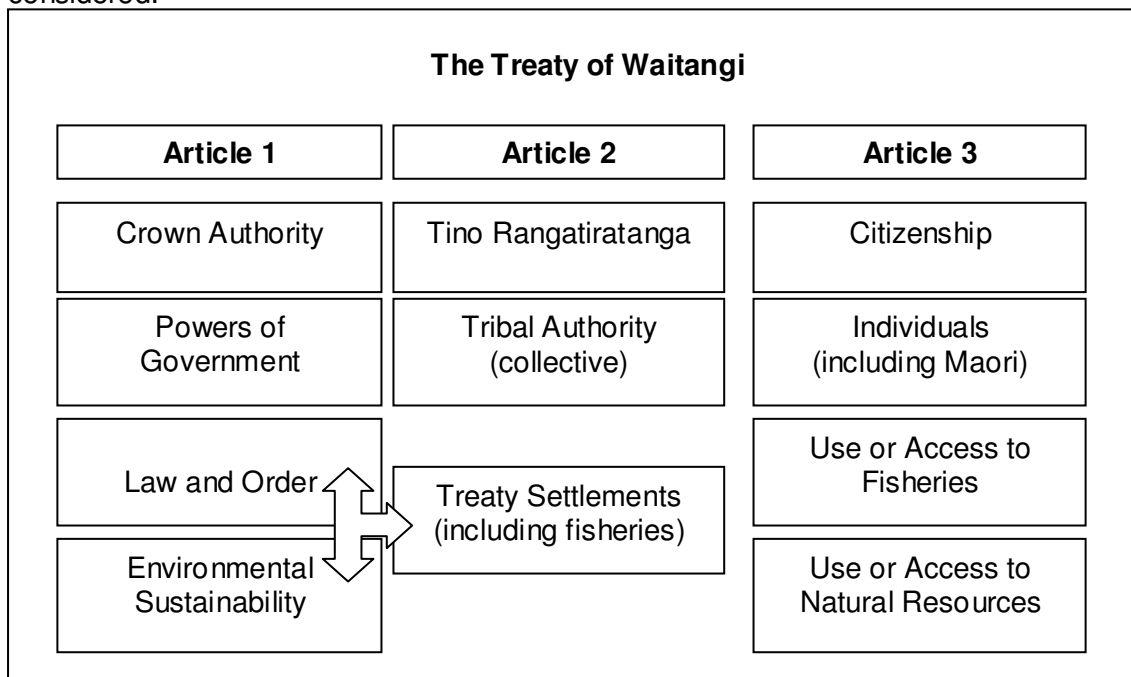


Fig. 1 Framework showing where environmental sustainability, law and order, Treaty Settlements, and citizen privileges including use and enjoyment feature in the separate Articles of the Treaty.

Clearly, Te Ohu Kai Moana has a fundamental concern with protecting and enhancing the Article II rights of Maori secured and guaranteed by Te Tiriti o Waitangi: “te tino rangatiratanga...o ratou whenua o ratou kainga me o ratou taonga katoa”, or the “full and undisturbed possession of their lands and estates 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”¹⁴.

Applying the Articles of the Treaty of Waitangi

The Crown must balance the rights and obligations contained within the separate Articles of the Treaty when exercising its powers. Under Article I of the Treaty, the Government has the right to make laws. This includes the right to make laws for resource conservation. However, in finding the most appropriate options, regard should be had to Articles II and III.

Under Article II, Maori are guaranteed their tino rangatiratanga – tribal authority over tribal resources. This includes a right to manage and develop resources in accordance with tribal practices subject to Article I (i.e. as long as they are practiced within sustainable limits). In today’s terms, Article II of the Treaty involves a ‘bundle’¹⁵ of rights including ownership (sometimes referred to as “customary title” or “aboriginal title”) and rights of access, use and management. These rights are exercised by the collective groupings of whanau, hapu and iwi.

Some of these elements have been given recognition in the law. For example, the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 provides for Maori rights of access to, and management of fish. Other elements of the ‘bundle’ continue to be pursued by Maori through different processes (see Information Box 1). Under Article III, Maori hold rights of citizenship. These include rights to be treated equitably and fairly as with all citizens.

Rational for Priorities when Operating the Articles of the Treaty

Te Ohu Kai Moana acknowledges that the Crown has the right to make laws for environmental sustainability (including conservation) under Article I of the Treaty that are designed to ensure people’s use of natural resources occur within sustainable limits. Environmental sustainability including the protection of biodiversity from threats that undermine its long-term viability must have the **highest possible priority** accorded to it when situations involving competition for limited resources arise.

In the event of conflict between different forms of use (i.e. extractive and non-extractive) over and above sustainability limits the Crown must examine its Treaty obligations for guidance. In this context the options chosen to conserve resources must have **the least possible impact on Article II Treaty rights** (and arguably Article III rights), while achieving the objective of sustainability.

Maori fishing rights include commercial and customary non-commercial aspects. These rights are distinct from both recreational or amateur fishing ‘rights’ which we regard as privileges because there is no such equivalent settlement with the Crown validating them as perpetual property rights. These activities form components of Article III under the general category of **‘public use and enjoyment’**. We submit that

¹⁴ The Treaty of Waitangi (extracts from the English and Maori versions)

¹⁵ See the Marine Farming Report from the Waitangi Tribunal

under the Treaty, the Crown maintains the right, and indeed duty, to withdraw or withhold those privileges to accommodate Article I sustainability limits or Article II Treaty Settlements.

Maori commercial and customary non-commercial rights are also unique because together they form the substance of a treaty settlement package under Article II of the Treaty. Te Ohu Kai Moana submits that enduring treaty settlements are certainly in **‘the public’s best interest’** if law and order is to be maintained (see fig 1). Te Ohu Kai Moana has always argued¹⁶ that the utilisation of resources within sustainable limits is an over-riding priority.

If sustainability of natural resources takes first priority in decisions about the use and allocation of resources, we submit that non-commercial customary interests take **second priority**, ahead of other interests (including Maori commercial interests). In the Treaty settlement context, Maori commercial interests must take **third priority** behind customary and sustainability needs because together they are both derived from Article II settlements with the Crown and provide the basis of a full and final settlement.

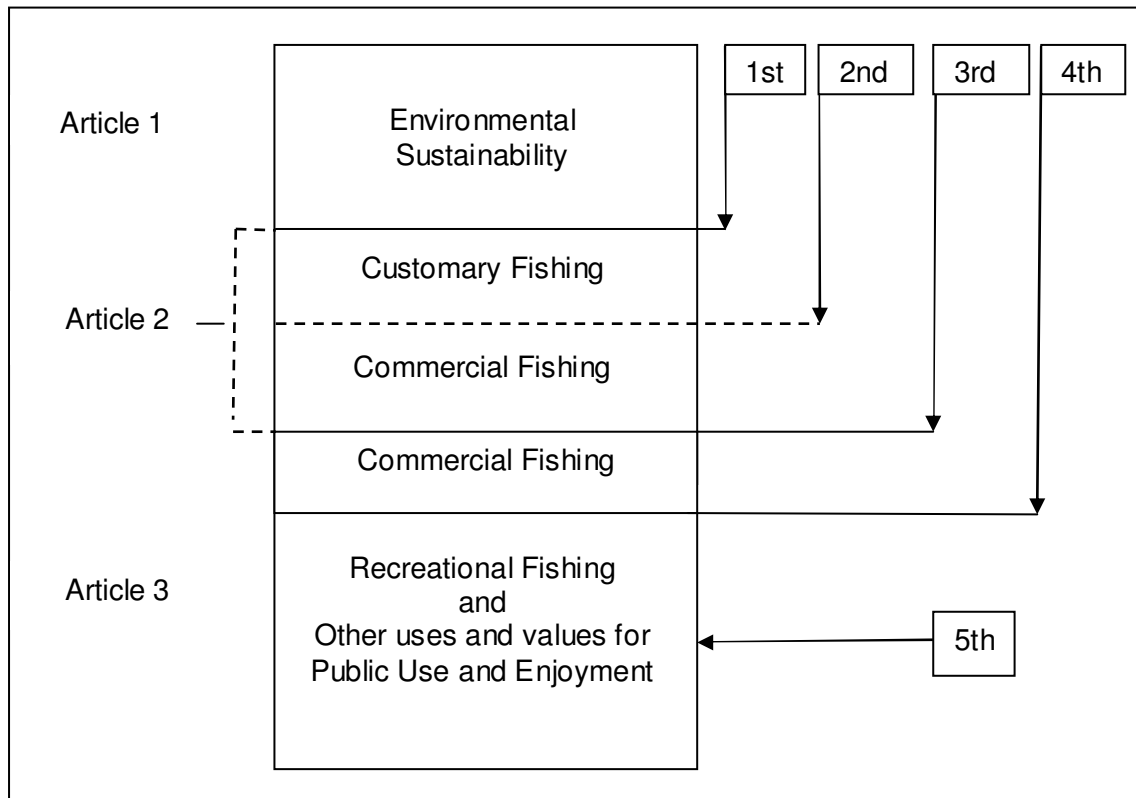


Fig 2. Showing how priority should be accorded when situations involving conflict over limited resources arise.

¹⁶ Te Ohu Kai Moana, (2002) Ahu Whakamua, p15

Appendix 2

Tuesday, 28 October 2003

File: P108-03-02/TM

The Kaipara Harbour Sustainable Fishing Study Group
P.O. Box 68228
Newton
Auckland

Tena koe

Kaipara Harbour “Strategy”

Thank you for the opportunity to meet with your group for discussions about the Kaipara strategy on 20 October 2003. Te Ohu Kai Moana supports the development of any initiatives taken to encourage Maori (commercial and non-commercial) and other right-holders participation in, and discussion on, the future management of the Kaipara Harbour. We note your intention now is to further the development of a “strategy” as opposed to a “fisheries plan”. This represents a significant procedural change in that, if the strategy as you described it to us at the meeting were to proceed in its current form, then ministerial approval would be needed for each regulatory change. We understand that this would occur within the overall context of a Ministry of Fisheries prioritisation exercise.

In our earlier submission we stated that “Clearly any precedence established by this plan will have overarching implications for future area-based fish plans, and in particular other Harbour areas found throughout New Zealand. This in turn will of course affect the way that Maori commercial and non-commercial managers are able to exercise Tino Rangatiratanga and Kaitiakitanga”.

The key points that this submission addresses are:

- Information needs
- Stakeholder participation and commitment
- Consideration of a full range of options and their implications
- Analysis of the options
- Development of a vision and objective(s) for the long term future of the harbour

Information Needs and Stakeholder Participation and Commitment

1. Your covering letter dated 4 October 2001 indicated that the Minister of Fisheries had asked if a “local solution” could be found to “sustainability concerns” raised about the Kaipara Harbour. However, your document does not outline what sustainability concerns have been raised, nor does it provide any quantitative or semi-quantitative information about the status of the species or stocks in question. While Te Ohu Kai Moana appreciates that there has been ongoing conflict between various people in relation to Kaipara Harbour fisheries, this in itself is a symptom of the sustainability problem(s) rather than the cause. Given that little information of this nature is contained within your document the specific solutions that you have proposed cannot be weighed against a clearly articulated core problem. This seems a little like putting a bandage on a wound rather than first treating the wound itself.
2. Te Ohu Kai Moana suggests that your draft document would benefit greatly with the inclusion of a “Problem Statement” that clearly and concisely articulates which species of fish or shellfish the sustainability problem(s) you are attempting to address, relate(s) to. You may also consider including background information about what concerns have been raised and why. The diagnosis of the cause will then assist with possible treatment options.
3. The Ministers term “local solution” also raises an interesting matter that would benefit from further clarification. Is it intended that the term “local solution” relates to the local residents finding a solution? Or is it that the local fisheries sustainability issues need to be addressed by all right-holders who have existing property rights in the fisheries concerned? Te Ohu Kai Moana interprets the term as having the latter, rather than the former meaning, although the two are clearly interrelated. The way in which this term is interpreted will clearly result in quite different people being involved in finding potential solutions. Ultimately this will lead to different levels of commitment by stakeholders in supporting the implementation of the solutions. As I am sure you will agree, proper participation leads to commitment, and collective commitment to a course of action, is half the problem solved.
4. You may be aware that Te Ohu Kai Moana has frequent dealings with matters relating to mandate, consensus decision making and disputes resolution just to name a few. You may also be aware the Te Ohu Kai Moana has an interest in protecting Maori rights established via the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [TOWFCSA]. These rights are both commercial and non-commercial. These rights are manifest in the complete spectrum of “the business and activity of fishing” by such activities as; owning quota, managing trade and on-selling of quota, going fishing, processing and packaging of fish, marketing fish, selling fish, providing fish for traditional customary purposes such as hui and tangi, and managing areas of special significance to Maori. This spectrum of Maori rights, interests and activities all originate from the TOWFCSA. Te Ohu Kai Moana is keen to ensure that all these activities, and the people involved in managing them, have been appropriately invited to, or better yet actively engaged in, the development of this plan.
5. Our inquiries into the participation and working relationships between some of these people have left us disappointed. We do not wish to dwell on the cause for this situation. We are however, concerned that this is an important requirement to the success of this, potentially the first, area-based plan. We would encourage

your group to continue to work on improving this area so as to set a good example in “productive working relationships” for further area-based Fish Plans.

6. With this in mind we suggest the plan would benefit from an agreed “Terms of Reference” and a series of objectives that aim to address the problems identified. The Terms of Reference will need to be agreed to by the people involved in the areas we have highlighted above. We would also be willing to assist in facilitating the development of a Terms of Reference and identification of other interest groups who may not have, as yet, been engaged productively.

General Consideration of Options

7. As already indicated above, without a clear statement of the problem(s) it is difficult to comment on the appropriateness of the specific proposed options presented in your document. However, for the purpose of providing you with some constructive initial feedback Te Ohu Kai Moana have the following general comments and questions to offer:
8. Risk analysis. Has your group considered what will happen if you do nothing? The analysis of this option and any others is contingent upon having a carefully thought through problem statement. However, without continuing to labour this point, the “do nothing option” may be worthy of consideration. This will provide decision makers with projected baseline outcomes against which they can consider the options or outcomes sought from any other proposed course of action.
9. Legal risks may also require assessment against any specific option(s). At this stage Te Ohu Kai Moana will withhold comment on the specific proposals suggested as management options within the fish plan. It is suggested that a more comprehensive scoping, assessment and prioritising exercise should be carried out before we invest valuable time in commenting upon the best available option(s).
10. National Implications. An important consideration is the potential national consequence of Harbour based QMA’s. For example, how will the customary and commercial rights of Maori, secured through the TOWFCSA be protected and integrated within such plans? What are the long-term effects on these rights if this plan sets a precedent? Further, how will the Fishery Plan help with integrating Maori commercial and non-commercial rights in this plan and at a national level?
11. Non-commercial Customary Priority. Te Ohu Kai Moana recommends the plan contain an explicit statement about the priority for non-commercial customary fishing. Arguably current legislation provides for this; however it is not explicitly stated. As discussed above Te Ohu Kai Moana is concerned to protect the rights secured in the TOWFCSA and a statement of this kind within your plan would be helpful in making this very clear. It would also serve to carry the Treaty Principle of “good faith” into your plan.
12. Compensation. Te Ohu Kai Moana holds quota throughout New Zealand, ultimately for the benefit of all Maori. Therefore, any potential change to the nature and extent of those rights, such as displacement of commercial fishing rights resulting in economic loss must be carefully thought through and negotiated with the respective right-holders. Te Ohu Kai Moana is concerned to ensure that the assets secured for Maori through the TOWFCSA are not eroded

or devalued in any way. Should any displacement option be imposed upon right-holders this must properly recognise the degree of displacement and provide appropriate compensation options within the plan? This course of action would serve to transfer the Treaty Principle of “create no more grievances” into your plan.

13. Costs benefit analysis. Has your group considered if there might be a more elegant ways of delivering solutions? For example, in the case of the proposed separate quota management area there will be costs in establishing a separate QMA. These costs are likely to fall on the commercial fishers and quota owners, as has been the case in the past. However, what benefit will the commercial fishers and quota owners gain from a separate QMA? An alternative solution might be achieved which delivers the same outcome you are looking for (i.e. controlling commercial access and effort). As the Kaipara Harbour is included in statistical areas 044 and/or 045 these areas may provide the same spatial framework as the separate QMA that you are proposing. If an agreement can be reached on effort and access within one of these statistical areas the quota owners may, in turn, be willing to develop a code of practice for commercial fishers in the harbour. This code of practice, if need be, can then be regulated as a statutory rule through the Fisheries Plan. Unfortunately as your discussions to date have not involved the wider commercial sector the opportunity and willingness for this type of creative problem solving may have been missed.

14. Long-term incentives for sacrifice, and benefit sharing. The plan does not contain a long-term vision for the future of the Kaipara Harbour. Nor does it contain any goals or objectives with a view to a healthy and vibrant fishery in the future. Te Ohu Kai Moana suggests that your group consider what incentives you might usefully build into the plan. Incentives can be developed against the magnitude of sacrifice made by each sector group. Such an objective will encourage each sector group to look carefully at what they can feasibly do to secure their interests in the future. For example, a sector group may develop a strategy within the plan that will control effort. The strategy will presumably contain a measurable target with regular monitoring and reporting periods. Under these circumstances the sector group will be in a position to demonstrate their credibility in terms of achieving sustainability outcomes, a little like collecting credits. Should the fishery improve in the future a TAC allocation agreement can be built into the plan that take the sacrifices or credits into account.

Summary of key points

Te Ohu Kaimoana therefore;

- **Supports** the development of Fisheries Plans where they actively seek to integrate the rights of Maori (both commercial and non-commercial) that have been secured in the TOWFCSA.
- **Caution** that any erosion of those rights through insufficient consideration and negotiation may serve to undermine the settlement and potentially cause more harm than good.
- **Recommends** that clarity is needed on the interpretation of “local solution”.
- **Recommends** that a clearly articulated “Problem Statement” be developed as a starting point before any further management options are developed.
- **Recommends** that a more inclusive process be developed to bring wider right-holder participation into the problem solving arena and that a Terms of Reference be developed with those right-holders.
- **Recommends** that information about the state of the Kaipara Harbour fisheries be collated, summarised and distributed to all right-holders to assist with the development of management options.
- **Recommends** that a statement about the priority of non-commercial customary harvest is included in the plan.
- **Recommends** that a risk analysis including social, cultural and economic consequences of the “do nothing” option be undertaken for the Kaipara Harbour fisheries.
- **Recommends** that a vision, goal and objective(s) be developed within the plan that will provide incentives for right-holders to ensure the long-term sustainability of the Harbour.

Thank you once again for providing us with an opportunity to comment. We welcome further opportunities to discuss these issues, and would be happy to comment on any further draft material you would like us to review.

Noho ora mai

Craig Lawson
General Manager Policy