

Maori power

The Maori fisheries settlement is a world leader in terms of resource transfer to indigenous people

The management of fisheries through the use of property rights is often perceived as being anathema to the recognition of indigenous fishing rights. Experience in New Zealand suggests that the opposite may, in fact, be the case. Not only are indigenous fishing rights compatible with a property rights approach to fisheries management, such an approach can be used to settle claims involving indigenous fishing rights, to preserve those rights for future generations, and to integrate such rights within a wider fisheries management framework.

Throughout the world, State management of fisheries using regulatory instruments has left indigenous communities subject to the values and aspirations of the dominant culture as represented by the government of the day. No matter how liberal, democratic and egalitarian the State may be, the final result is likely to further erode the ability of indigenous communities to manage, harvest, and use natural resources in ways that are consistent with their cultural needs. A property rights-based system can provide a robust mechanism for ensuring the sustainable utilization of fisheries, while providing for indigenous rights holders to realize their often divergent social and economic aspirations.

Indigenous communities traditionally have their own internal regulatory mechanisms for management of their fishing activity. Such regulatory mechanisms are integral to the nature of their fishing rights.

Recognizing and providing for indigenous and coastal community fishing rights requires empowering the communities concerned to use those mechanisms, and integrating them within

the wider fisheries management framework. In fully exploited, multiple-user fisheries, a system based on well-defined property rights allows the rights of indigenous communities to be recognized and provided for, relative to the rights of other groups.

In New Zealand, the introduction of a property rights system for fisheries not only gave rise to the largest indigenous rights claim in the country's history, it also provided the means for that claim to be settled and for indigenous rights to be recognized and provided for within the wider legislative framework. Maori fishing rights have been recognized by a combination of property rights instruments, vested in tribal or sub-tribal communities rather than individuals. It is up to those communities to decide how they manage those rights.

As the indigenous people of New Zealand, Maori held customary fishing rights under British common law. These rights were guaranteed by the Treaty of Waitangi, signed between the British monarchy and Maori chiefs in 1840. Customary fishing was exempted from the rules and regulations in fisheries legislation made after the signing of the Treaty. However, the exact nature of these rights was never defined.

Slow negation

As a result, Maori fishing rights were slowly negated by the egalitarian principles of the dominant European settler society—one law for all. The statutory provisions protecting Maori customary fishing rights were worthless, unable to define the nature of those rights, and then protect them from encroachment by the activities of other fishers. The Treaty of Waitangi was regarded as a legal nullity by the courts until the 1980s.

In the mid-1980s, the government in New Zealand moved to introduce a quota management system based on individual transferable quota (ITQ) for major commercial fish stocks. It was this move to create an artificial property right to take fish, and then allocate that right to existing commercial fishers, that drove Maori to seek an injunction against the government, saying that their customary fishing rights had not been taken into account.

The task of defining the nature of Maori customary fishing rights then fell to the courts. In an important test case in 1986, a Maori individual was found not guilty of taking undersized shellfish on the grounds that he was exercising a customary fishing right. He had fished in accordance with customary practices by obtaining permission from the *kaitiaki*, or guardian, of the *tangata whenua* from the area where the fishing occurred, and acted in accordance with the instructions of the *kaitiaki*.

The concept of *tangata whenua*, or 'people of the land', is crucial to the definition of Maori customary fishing rights. *Tangata whenua* are the *iwi* (tribe) or *hapu* (sub-tribe) that hold customary authority over a particular area. Rather than being general Maori rights, customary rights belong to *tangata whenua* and can only be exercised within their area. The full nature and extent of customary fishing rights was

elucidated by the Waitangi Tribunal as a result of extensive research into tribal claims to fisheries.

The Waitangi Tribunal is a permanent commission of inquiry, set up in 1975 to investigate claims regarding breaches of the Treaty of Waitangi. Maori customary fishing rights were found to have both a commercial and a non-commercial component (based on evidence that Maori were trading seafood widely, prior to the signing of the Treaty of Waitangi). The fisheries they exploited were extensive, and the methods to catch fish were highly advanced, compared to those of their European counterparts. The Tribunal also ascribed a developmental component to the customary right, giving Maori a right to a share of the deep-sea fisheries off the coast of New Zealand, even if they were not being fished at the time the Treaty was signed.

Customary rights

Most importantly, Maori customary fishing rights pertained not only to the use of fisheries, but also to the management of the resource. While fishing practices differed among the different tribes, customary fisheries had always been actively managed by *kaitiaki*. Traditionally, fishing outside the rules set by the *kaitiaki* could subject the fisher to severe penalties. In 1986, the High Court placed an injunction on the Crown, preventing it from proceeding with the

introduction of the quota management system. The Court advised the Ministry of Fisheries that the aims of the Crown in introducing the quota system were commendable. At the time, the Waitangi Tribunal observed that the ITQ right had much in common with the rights guaranteed to Maori under the Treaty of Waitangi—it guaranteed access, it was perpetual, and it provided opportunities for autonomous management. The problem was that indigenous rights had not been recognized or provided for in the allocation of commercial fishing quota.

An interim settlement of Maori fisheries claims was negotiated in 1989, and full and final settlement signed and legislated for in 1992. The principal effect of the settlement on the customary fishing rights of Maori was to split the commercial and non-commercial components of those rights. This distinction was necessary to accommodate the settlement within the broader fisheries management framework, which was by then based on the use of ITQ for commercial fisheries, while non-commercial fishing continued to be managed by regulation.

The commercial rights of Maori were recognized through the provision of assets comprising quota, shares and cash. The 1989 interim settlement provided for 10 per cent of all existing ITQ to be bought back from fishers and provided to Maori. The 1992 Settlement centred on the Crown's provision to Maori of \$150 million to purchase a half-share of Sealord Products Ltd. Sealords is the largest commercial fishing company in New Zealand, owning over 20 per cent of all commercial fish quota. In addition, the Crown has an ongoing obligation to allocate 20 per cent of quota for fish species newly introduced to the quota management system to Maori.

The Settlement legislation established the Treaty of Waitangi Fisheries Commission, previously the Maori Fisheries Commission, to manage the commercial settlement assets on behalf of Maori. The quota held by the Commission is no different from other ITQ generated under the quota management system. The Commission currently leases quota to tribes on an annual basis. In time, the

quota will be allocated to the beneficiaries of the settlement, giving them all the benefits and obligations associated with quota ownership.

The settlement is a world leader in terms of resource transfer to indigenous people. While other settlements have addressed claims to individual fisheries, no other country has transferred close to 30 per cent of its total commercial fishing industry to its indigenous people. Maori are the single largest player in the rock lobster and paua fishery, and one of the top two players in the snapper fishery. In conjunction with managing these assets, the Commission has become one of the best informed and articulate participants in the New Zealand fishing industry, providing valuable advice both to government and to industry bodies.

The Commission also invests in the future of the Maori fishing industry, spending around \$1 million dollars annually on its scholarship programme, training up to 300 young Maori a year. The programme focuses on three areas: business management, studies directly related to fisheries, and a highly successful seafood processing course. The Commission offers up to nine \$15,000 per year scholarships to study at the Australian Maritime College and the University of Tasmania.

The non-commercial component of the customary right was provided for through regulations that devolve the management of non-commercial customary fishing to *kaitiaki* appointed by the *tangata whenua*. The regulatory framework provides an effective way of recognizing and providing for the traditional fisheries management practices of Maori. The framework is highly flexible about the way *tangata whenua* manage their fishing activity, but prescriptive in terms of mandate issues, recording of catch, and accountability mechanisms.

Mandated representatives

Tangata whenua must establish mandated representatives for their area before they can actively manage their non-commercial fishing activity. The regulations provide for *tangata whenua* to appoint *kaitiaki* who are responsible for managing customary fishing in their area. Disputes over who should be *kaitiaki* or

over tribal boundaries must be resolved by *tangata whenua*.

K*aitiaki* manage customary fishing through an authorization system which requires them to specify the exact nature of the fishing activity that is being authorized, including species, quantities, areas, size limits, methods, purpose for which the fish will be used, and instructions for the disposal of any bycatch. Each of these factors is at the discretion of the *kaitiaki*, who must act within the bounds of sustainability and with due regard for the environment.

Regulations also provide for the establishment of areas known as *mataitai* reserves over traditional fishing grounds. *Mataitai* reserves are a form of Territorial Use Right. There is no commercial fishing permitted within these reserves and all non-commercial fishers, including recreational fishers, must act in accordance with bylaws made by the *kaitiaki* when fishing within the reserve area.

Fishers must report back their actual catches to the *kaitiaki*, who record the information for fisheries management and compliance purposes. *Kaitiaki* must report quarterly to the Ministry of Fisheries on how many of each species were taken out of each management area within their traditional boundaries. The information generated by the regulations is then used to set sustainability measures, and provides a powerful tool for *tangata whenua* to participate in wider fisheries management processes.

After setting the Total Allowable Catch (TAC) for a fishery, the Ministry of Fisheries must share the TAC amongst the three extractive fishing sectors—customary non-commercial, recreational and commercial. The customary non-commercial needs of Maori have a *de facto* priority in this process—the needs of Maori are provided for first, to the extent that they are not commercial. In the small toheroa shellfish fishery, this has resulted in the entire TAC being set aside for customary non-commercial needs.

Individual customary fishers are accountable to the *kaitiaki* who authorizes

their activity. *Kaitiaki* are primarily accountable to the *tangata whenua* who appoint them, and to the Ministry of Fisheries, for the sustainable management of fisheries and for the maintenance of effective records for both management and compliance purposes. The State is still ultimately responsible for the overall sustainability of fisheries and for the provision of assistance to *kaitiaki* to enable the effective operation of the customary fishing regulations.

As a result of the 1992 Treaty settlement, Maori now own around 40 per cent of New Zealand's commercial fish quota. Taking joint ventures into account, Maori have a controlling interest in more than 60 per cent of New Zealand's commercial fishing industry. However, the commercial assets of Maori continue to be managed by the Treaty of Waitangi Fisheries Commission on behalf of all Maori, and have yet to be allocated to tribes and/or any other beneficiaries identified under the terms of the settlement.

While many tribes are benefiting from the annual leasing of quota by the Commission at discounted rates, they will not have autonomous control over the management of their commercial fishing activity until allocation has occurred. The commercial interests and objectives of Maori may differ from tribe to tribe. They may also be different from the interests of other commercial fishers in their area. ITQ allocation will allow the different priorities and interests of tribal groups to be realized within the same framework, while minimizing the opportunity or need for the State to interfere with those interests.

Distribution inequities

Property rights instruments such as ITQ are often given a number of negative associations. These include the privatization of what are seen to be collective rights, inequities in the distribution of rights, alienation of traditional fishers from their livelihoods, and even the demise of coastal communities. However, as far as the indigenous fishing rights in New Zealand are concerned, all of these occurred to some degree before the introduction of ITQ. Ironically, it has been the

introduction of ITQ and other property rights instruments that have provided a means of addressing these issues.

The introduction of the quota management system meant that the Crown was able to buy back rights from existing commercial fishers and re-allocate them to Maori. This was meant to compensate them for the attenuation of their rights over the previous 140 years (obviously, if the initial allocation of ITQ had taken Maori rights into account, no buy-back would have been necessary). The Settlement legislation ensures that the ITQ provided to Maori remains under collective ownership until such time as allocation occurs.

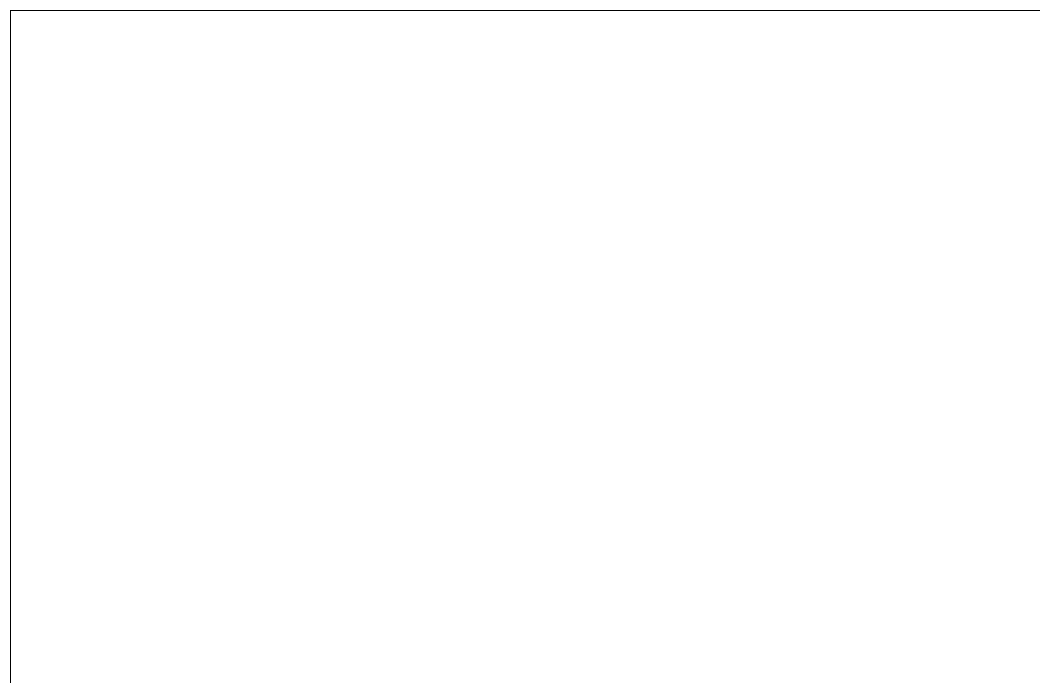
The Treaty of Waitangi Fisheries Commission has been working on criteria for tribes to be eligible to receive settlement assets. One such criteria is that tribal bodies must have constitutional arrangements in place to ensure that the collective commercial fishing rights of a tribe, as represented by its share of quota and cash, are not alienated from the tribe without the necessary level of accountability being present. Once allocation has occurred, then the tribes can manage their commercial fishing activity the way that suits them, incorporating whatever combination of economic and social objectives they desire.

Tangata whenua are now regaining control of their customary non-commercial fishing activity. Customary fishing regulations are now in place and are being implemented by tribes and sub-tribes around the country. The primary hurdle facing tribes seeking to utilize the new management framework is the determination of mandate over areas, and the resolution of disputes with neighbouring groups over boundaries and *kaitiaki* appointments.

Customary non-commercial fishing rights, while not represented by ITQ, are still considered property rights within New Zealand's fisheries management framework. Fishers must fish within the rules and limits specified by the *kaitiaki* for the area, and must report back on what they actually caught. The Ministry of Fisheries must then make an allowance for the extent of customary needs when allocating the Total Allowable Catch (TAC) for any fishery. The proportion of the TAC set aside for customary non-commercial take is effectively the property right associated with customary non-commercial fishing.

Management control

The aim of all tribal groups must be to regain control over the management of all their fishing activity, both commercial and non-commercial. Once quota has been allocated, and *kaitiaki* have been



appointed, *tangata whenua* will be in a position to manage their fisheries in a more holistic manner. Importantly, the well-defined rights of *tangata whenua* will ensure that there is always fish available for everything from commercial purposes on *marae* (meeting ground) to personal consumption.

The current direction of fisheries management in New Zealand foresees the devolution of management responsibilities to stakeholder groups, and stakeholder participation in the development of management plans for key fisheries and/or areas. As a result of the indigenous fisheries settlement, Maori are well placed to take advantage of the opportunities offered by such an environment. With well-defined rights firmly secured, Maori are destined to be at the centre of co-operative management initiatives in the future. ¶

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