Brief on Customary Use Regulations and issues and opportunities for marine conservation

Vince Kerr Feb 5 2001

Background

The 'customary fishing regulations' (as they are commonly referred to) are correctly referred to as: Fisheries (Kaimoana Customary Fishing) Regulations 1998.

These regulations are a result of the 1992 Sealord Deal. Prior to the Sealord deal, Maori had their traditional fisheries and customary use rights established and guaranteed in European law by the Treaty of Waitangi. This was defined further by Section 88(2) of the Fisheries Act 1986. As part of the Sealord deal Section 88(2) was removed from the Act and replaced by the Fisheries (Kaimoana Customary Fishing) Regulations 1998. Essentially, the Sealord deal defined commercial fisheries rights of Maori and the Fisheries (Kaimoana Customary Fishing) Regulations 1998 defined rights of Maori in relation to traditional fisheries, customary use and fisheries management involvement.

Following on from customary fisheries settlements (including freshwater fish provisions) involved with the Ngaitahu settlement, Iwi in the North Island are now intending to use, or are currently using, the regulations.

The Fisheries (Kaimoana Customary Fishing) Regulations 1998.

Below is an outline of the important sections of the regulations with some notes. All responsibility for approvals relating to the regulations rests with MinFish.

Secs 5-10: Confirmation of kaitiaki and designation of area/rohe the kaitiaki is appointed for. *A process for the appointment of kaitiaki and the designation of the rohe is described. The process includes public notification. Can be hapu, whanau or Iwi-based.*

Secs 11-13: Powers of kaitiaki in respect to customary fishing. *This section has a list of rules listing things like species and size etc. that the kaitiaki can control via permits to people wishing to practice customary harvest.*

Secs 14-17: Participation of tangata kaitiaki/tiaki in fisheries management. *This is an interesting bit! A key phrase is,* ***"tangata kaitiaki may provide input to and participate in the process of setting or varying sustainability measures concerning all or part of their rohe".*** *It is stated*

that the Minister of Fisheries must ***have regard*** *to information provided by tangata kaitiaki. Also in this section is provision for Iwi management plans to address sustainability measures and a note that these plans can be recognised under the RMA 1991. In addition, there is a provision to appoint honorary fisheries officers. This section is vague, like Part II of the RMA, however it invites Maori to participate in achieving sustainability - which of course is not defined! Another interesting aspect of this is that an Iwi management plan could be comprehensive in its efforts to integrate freshwater, land management issues and coastal and marine management approaches. What statutory body or plan currently achieves this?*

Secs 18-26: Mataitai reserves. *These sections define the mataitai reserve, the process of establishment and some guidelines of things that can't be done - the most important of these are:*

1. *Unreasonably affect the ability of local community to take fish etc. for non-commercial purposes.*
2. *Prevent commercial quota holders from harvesting their entitlement from within the quota area (This is similar to the argument the commercial fishing lobby uses to oppose new marine reserves).*
3. *Label a* proposed *mataitai a marine reserve.*

Secs 27-32: Powers of tangata kaitiaki in mataitai reserves. *The important part of this section is the provision for the kaitiaki to make by-laws. The rules are a bit vague but potentially give the kaitiaki wide ranging scope and powers to protect or enhance traditional fisheries within the mataitai reserve. Section 28 says****,"kaitiaki can make by-laws for any purpose the kaitiaki consider necessary for the sustainable utilisation of the fisheries' resources in the reserve".*** *Section 28(3) also says,* ***"by-laws made under this regulation apply generally to all persons fishing in the mataitai reserve".*** *There is a process for the establishment of by-laws that is run by tangata kaitiaki involving public consultation and final approval by the Minister of Fisheries.*

Secs 33-46: Powers of Minister, accountability provisions and offences and penalties. *The Minister of Fisheries retains all approval and cancellation rights. Reporting and record-keeping requirements are significant and will be demanding on the kaitiaki. Fines up to a maximum of $10,000 can be imposed upon anyone convicted of unlawful catches or other offences against the regulations.*

Issues and opportunities for marine conservation

1. There is no reference to any involvement of DoC in any process described in the regulation.

2. Iwi can look at this regulation and in their view apply it to the entire economic zone i.e. the entire Northland coast out to a 200 mile limit; thus applying for kaitiaki and mataitai reserve areas for the lot. Ngapuhi have a project team led by Leatrice Welsh and supported by Auckland University and consultants preparing tangata kaitiaki and mataitai applications. They also have a current contract with MinFish to put together information on customary management techniques and examples of by-laws which could be used in Northland.

3. Iwi essentially have the opportunity to define sustainability measures and resulting by-laws relating to the resources in the context of their rohe and tikanga maori. The regulations don't define the limits of these powers or what sustainability means so Iwi most likely will attempt to do so.

4. There is a contradiction (and therefore potential source of conflict) built into the regulations. On the one hand Iwi are invited to participate in management of the resource for sustainability, but on the other hand anything they do or propose can be vetoed or cancelled by the Minister of Fisheries. These contradictions are written in soft language subject to interpretation; for example, mataitai reserve by-laws are not supposed to have "unreasonable" effects on existing commercial or recreational use. The obvious Catch 22 here is that if a resource is presently exploited to the point of extinction (an East Coast tuatua bed, for example), how can a by-law be made that manages the tuatua bed without restricting peoples' 'right to harvest'?. This obvious tension over the loss of 'rights' when a conservation measure is put in place is not resolved by the regulations. They do, however, make it possible for Iwi to take action, and in the end any conflict that arises over a by-law is simply decided by the Minister of Fisheries.

Implications for Marine Conservation

Looking at the 'new environment' from a past perspective. Iwi groups are unlikely to support any marine reserve proposal until they are satisfied that they have worked through their respective kaitiaki and mataitai reserve plans - so marine reserve proposals in Northland may be stalled until these processes are advanced sufficiently.

Looking at the 'new environment' from another perspective which is about partnership with Iwi, new possibilities arise.

It could be argued that any management of the coastal marine resources is better than no management, which is sometimes the case now.

Within the mataitai reserve the by-laws are the key. The clear reference to sustainability in the regulations implies there could be a strong conservation focus to them. Indeed, some areas and some resources have been so exploited that only a conservation measure could lead to sustainability. Following this idea, Iwi could impose a traditional rahui and have legal status for that rahui as a by-law of a Mataitai.

Following from the above it seems sensible to promote potential conservation gains resulting from certain by-laws by supporting the kaitiaki in their efforts. Supporting partner groups could support traditional perspectives with scientific argument and survey information potentially as part of a network strategy.

Another scenario is that given the possible limits on the by-laws to achieve conservation measures, there could be a point where a marine reserve could become the best approach for a given area within the broader mataitai or adjacent to it. This would be facilitated if the 'no take' status could be subject to generational review, making the marine reserve more compatible with the traditional rahui. A concept that has growing support and scientific evidence is the value of marine reserves as a nursery for species. This is a kohanga in Maori. In traditional management many provisions were made for the protection of kohanga areas, therefore this aspect of marine reserves is potentially consistent with tikanga maori. In time, it could be viewed as an advantage that marine reserves are established by an Act rather than a regulation. Regulations can be changed by a Minister, Act has a much more involved process of parlimentary review before a change can be made. If the more conservation-oriented mataitai by-laws start to be rejected by the Minister of Fisheries, the marine reserve process may have more appeal. Marine reserves, in addition to fisheries management, allow recognition of other values such as education and recreation.

These are a few of the opportunities for marine conservation arising from the customary fishing regulations. More will arise as the processes develop over the coming months.