BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 240

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declaration pursuant to s 310 of the Act
BETWEEN	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST
	(ENV-2016-AKL-000173)
	Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent

Court: Environment Judge JA Smith
Environment Commissioner KA Edmonds
Environment Commissioner D Bunting

Hearing: At Tauranga, 14-16 November 2016

Appearances:

RB Enright and MC Wright for the Trustees of the Motiti Rohe Moana Trust (**Rohe Moana Trust**), New Zealand Maori Council, Royal Forest & Bird Protection Society of New Zealand Inc

PH Cooney and RM Boyte for Bay of Plenty Regional Council (**the Regional Council**)

N Anderson and EP Chapple for the Attorney-General

JM Pou and AM Neems for Ngāti Makino Heritage Trust (**Ngāti Makino**), Maketu Taiapure Committee, Ngāti Ranginui Iwi Incorporated Society, Ngāti Pikiao Environmental Society and the Management Committee of the Hokianga o Nga Whanau Hapu Collective

SJ Ryan for the Astrolabe Community Trust

TL Hovell for Nga Potiki o Tamapahore Trust (**Nga Potiki**)

JN Gear for Te Runanga o Ngati Awa, Te Patuwai Tribal Committee (**TRONA**)

Date of Decision: 5 December 2016

Date of Issue: 5 December 2016

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT

A: The application for declaration is granted and a modified declaration made as follows:

(1) It is lawful (intra vires) for the Council to include objectives, policies and methods (including rules) in its proposed Regional Coastal Environment Plan in spatially defined parts of the coastal marine area that avoid, limit or discourage fishing techniques or methods with a sole or dominant purpose to achieve any or all of the following:

(a) maintain indigenous biological diversity;

(b) protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area;

(c) preserve the natural character of the coastal environment (including the coastal marine area);

(d) recognise and provide for the relationship of Māori and their culture and traditions with the ancestral waters and taonga;

(e) have particular regard to the exercise of kaitiakitanga;

(f) have particular regard to intrinsic values of ecosystems;

(g) take into account the duty of active protection of taonga, including restoration of mauri, as part of the principles of the Treaty of Waitangi.

(2) "Fishing" in the above declarations is as defined in s 2 of the RMA. For clarity, it includes disturbance of the seabed for the purposes of fishing. The declarations do not relate to aquaculture activities as defined in s 2 of the RMA.

(3) There may be other provisions that are justified to avoid, limit or discourage fishing techniques or methods but are not the subject of this application for declaration. Nothing in the above excludes or limits a merits-based consideration of whether the particular proposals are appropriate in the context of the proposed Regional Coastal Environment Plan.

B: Costs are reserved to be dealt with (if required) at the conclusion of the appeal.

REASONS

Introduction

[1] The Rohe Moana Trust has been an active party in many matters before the Environment Court relating to Motiti Island. Recent issues have involved not only the planning document for Motiti, but also issues surrounding the aftermath of the Rena wreck on Otaiti (Astrolabe) Reef. A number of appeals relating to the Regional Policy Statement have been resolved by Court hearing and amendments made to the Regional Policy Statement.

[2] The Rohe Moana Trust filed an appeal in respect of the Regional Coastal Environment Plan (**the RCEP**) subsequent upon submissions at the hearing stage. An application for strikeout by the Regional Council was heard and refused by the Court in decision [2016] NZEnvC 190. That contains useful background information to the submissions and appeals filed by the Rohe Moana Trust.

[3] The notice of opposition to the application for strikeout also led to the contemporaneous filing of these applications for declaration. They were originally to be heard together, but due to time constraints the parties agreed to hear the strikeout application first (which is decision [2016] NZEnvc 190) and leave this matter for subsequent determination.

[4] The wording of the declaration has been altered as part of an iterative process through the hearing, and that sought in final submissions for the Trust is annexed hereto and marked **A**. The Rohe Moana Trust now seeks a declaration:

> It is lawful (intra vires) for the Council to include objectives, policies and methods (including rules) in its proposed Regional Coastal Environment Plan in spatially defined parts of the coastal marine area that avoid, limit or discourage fishing techniques or methods with the sole or dominant purpose to:
>
> [there follows a list of items, essentially based around issues of biological diversity or around relationship of Māori with the waters and taonga (including fishery species)].

[5] Although the declaration has been broadly worded, this is to avoid the issues that would arise on any merits appeal having to be addressed at this stage. For example, issues of relationship of mana whenua have been deliberately avoided by this

wording. In addition, a reading of the appeal (a quick reference to the earlier strikeout decision will give the essential terms of this) will show that the Trust is seeking to identify particular areas within a spatially defined area involving Motiti Island, Otaiti (Astrolabe) Reef and a series of toka and reefs around it where certain forms of constraint might exist.

The relevance of the declaration

[6] Given the refusal of the Court to strike out the appeal, there are aspects of the appeal which could proceed without any determination of matters before the Court in this declaration. This would include, for example, consideration of particular controls (not being the taking of fish or fisheries allocation) in relation to particular sites identified of cultural value (see for example ASV) or ecological value. To assist with this we attach a copy of map 43B from the Regional Coastal Policy Statement as **B**.

[7] In addition to the whole area being covered by delineations as to natural coastal character and landscape, there are other particular cultural and ecological identifications which occur. Thus, at least in respect of some of the area, there is already an undisputed identification of particular relationship values and biological diversity values within the area. This might reflect in controls which do not amount to fisheries controls, including over structures (eg aquaculture), mining or sand extraction. Accordingly, it can be seen that the purpose of this declaration is to ascertain whether the applicant is able to go so far as to seek controls in particular areas that would avoid, limit or discourage all or some fishing techniques or methods.

The issue

[8] The core issue for this case, which all parties acknowledged is a real and complex issue, was the interface between the Fisheries Act 1996 and the Resource Management Act 1991, and particularly the application of s 30(2) of the Resource Management Act, which provides:

> (2) The Regional Council and the Minister of Conservation must not perform the functions specified in subsection 1(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

[9] All parties agreed that the application of this wording, in the circumstances of the Bay of Plenty Regional Plan at least, was problematic. The position of the Regional

Council is that it does not have the power to control the taking of fish or fishing methods which might occur within the water column or on the surface of the water. The position of a number of other parties, including the Motiti Rohe Moana Trust and Ngāti Makino, and to a lesser extent a number of the other parties, is that such control provisions under the RMA are not prevented. The Attorney-General is concerned to clarify the interface between the legislation and avoid plan provisions which offend s 30(2). The predominant purpose of this application for declaration is to provide for other matters under the Resource Management Act such as indigenous biological diversity (s 30(1)(ga)) or the relationship of Māori with water and taonga (ss 6(e) and 8).

Two regimes

[10] We were greatly assisted by the detailed background information given to us for the Attorney-General in this matter. As a result, we are satisfied that the Resource Management Act and the Fisheries Act are intended to work in tandem, and that the intent of the relevant provisions which occur at various places through both Acts is that both Acts are aware of, and attentive to, the other.

[11] It is clear, by virtue of this application for declaration, that the objective of the statutory drafters has not been achieved.

[12] Nevertheless, for reasons we will go into in greater detail in due course, it is clear to us that this is not a case where one statute could be said to impliedly repeal the other, or that there is intended to be a lacuna between the two Acts. This is reinforced by reference to the wording of various parts of the Fisheries Act and the RMA, both of which discuss matters such as sustainability and use of plans, and both of which have specific requirements to take into account any document generated under the other Act.

[13] A useful discussion of this interface is contained in the Primary Production Select Committee's report on the Fisheries Bill No. 63-2, which in part noted at viii:

> Many submitters commented that the environmental principles did not include:
>
> - protection and maintenance of intrinsic values;
> - protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
> - maintenance, protection and non-extractive uses of marine flora and fauna;

- maintenance and enhancement of the quality of the environment;
- protection of outstanding natural features.

> We do not support the inclusion of such principles in the environmental principles clause. These values are provided for explicitly in other legislation such as the RMA, Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and the Wildlife Act 1953. Their inclusion into the environmental principles will introduce a range of non-utilisation values into the bill and significantly undermine the interface with other statutes. **The current interface reflects acceptance that fishing, like other activities, can be curtailed under the RMA and other statutes on the basis of effects on matters such as intrinsic and amenity values**.

(emphasis added)

[14] In the High Court case *Reay v Minister of Conservation*[1] Pankhurst J relied on that passage to conclude that the Fisheries Act was not to be regarded as a code. Accordingly, this is not a case similar to those relating to GMOs, in particular *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council*,[2] or *Federated Farmers of NZ v Northland Regional Council*[3] where it could be said that there was silence within the legislation as to the relationship with another Act.

[15] Furthermore, it is also clear that the Fisheries Act intends to address, at least in part, the Crown's obligations under the Treaty of Waitangi and in accordance with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. In part this is through provisions such as in Part 9 Taiapure local fisheries and customary fishing provisions, and including s186(a) which provides a regime for temporary closures. Again, these provisions are not intended to be exclusive.

[16] We have concluded that, notwithstanding the fact that the Select Committee did not specifically refer to the relationship with, or to specific provisions of, the RMA, there can be no doubt that the Fisheries Act itself recognises that the RMA provisions in relation to ss 6(e) and 8 would continue to apply in certain circumstances and to some extent. Mutual recognition clearly includes all provisions of relevant documents, given that the RMA requires the regional council to specifically have regard to fisheries matters under s 66(2)(c) including:

> (i) management plans and strategies prepared under other Acts; and
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> ...

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1 [2014] NZHC 1844 (7 August 2014) at [46].
2 [2014] NZRMA 181.
3 [2015] NZRMA 217.

> (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fishing resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial customary fishing) ...

[17] Although regulations, as defined under the RMA, is only referring to RMA regulations, it is clear that the context requires us to consider s 66 as applying to the regulations under the Fisheries Act.

[18] Section 11(2) of the Fisheries Act has a similar provision requiring regard to any regional policy statement, regional plan or proposed regional plan under the RMA, before setting or varying any sustainability measure under the Fisheries Act.

[19] The parties accepted that the intent of the two Acts is that they work together, and that there may be overlap between the two. We were directed to s 30(2) of the RMA and s 11(2) of the Fisheries Act 1996 as key references to the interface of the two Acts.

Section 6 of the Fisheries Act

[20] In conjunction with the interface between the two Acts, the Fisheries Act itself provides in respect of regional plans at s 6(1):

> No provision in any regional plan or coastal permit is enforceable to the extent that it provides for–
>
> (a) the allocation to one or more fishing sectors in preference to any other fishing sector of access to any fishery resources in the coastal marine area; or
>
> (b) the conferral on any fisher of a right to occupy any land in the coastal marine area or any related part of the coastal marine area, if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area.
>
> The Fisheries Act defines "fishing sector", as used in s 6(1), to mean commercial fishers, recreational fishers, Maori non-commercial customary fishers and other fishers authorised to take fish, aquatic life, or seaweed under that Act (s 6(3)).

[21] We have not quoted s 6 of the Fisheries Act 1996 in full, but note that the heading to that section is "Application of the Resource Management Act 1991" and ss (2) derogates from ss (1) by providing a clear exception for aquaculture activities.

[22] The parties did not spend any particular time addressing this provision, given that it does not affect the jurisdiction of a council to make planning provisions. Section 6(1) simply provides that certain provisions are not enforceable. That being the case, it must at least be contemplated that there may be provisions within regional coastal plans that purport to address the allocation of fishing sectors or access to fishery resources or confer rights. Section 6 addresses matters of enforcement. Whilst we accept that it would be a matter that the Council and Court would take into account in setting provisions, it is not a jurisdictional bar to such provisions being considered for inclusion in a Regional Coastal Plan on their merits.

Section 30(2) of the Act

[23] On the other hand, s 30(2) does provide a jurisdictional bar if the circumstances of that subsection are met. It is important to understand the subsection in the context of the section as a whole.

The powers and obligations of the Council under s 30

[24] Section 30(1) sets out the functions of the regional council to give effect to the Act in its region. Subsection (d) deals particularly with the coastal marine area, and provides:

> ...
>
> (d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—
>
> (i) land and associated natural and physical resources;
>
> (ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area;
>
> (iii) the taking, use, damming, and diversion of water;
>
> (iv) discharges of contaminants into or onto land, air, or water and discharges of water into water;
>
> (iva) the dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations;
>
> (v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances;

(vi) the emission of noise and the mitigation of the effects of noise;

(vii) activities in relation to the surface of water;

...

[25] There are other subsections dealing with regional council functions related to the coastal marine area. One function is the control of discharges of contaminants into or onto land, air, or water and discharges of water into water (subsection (f)), which repeats the wording in subsection (d)(iv).

[26] Another function gives the Council powers to make rules to allocate the taking and use of water, heat or energy from water other than open coastal water. Subsection (fb) provides further powers, in conjunction with the Minister of Conservation, in relation to heat and energy from open coastal water and the establishment of a rule to allocate space in the coastal marine area under Part 7A (which relates to the occupation of the coastal marine area). In the RMA "water" is defined to "include freshwater, coastal water, and geothermal water", "coastal water" to include "seawater with a substantial fresh water component" and "seawater in estuaries, fiords, inlets, harbours, or embayments" and "open coastal water" defined as coastal water "remote" from these places.

[27] Subsection (ga) is of some particular importance in this case, and provides for:

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

[28] Subsection (gb) provides for "the strategic integration of infrastructure with land use through objectives, policies, and methods:", and (h) provides for "any other functions specified in this Act".

[29] These provisions are then subject to the constraint in s 30(2):

(2) The Regional Council and the Minister of Conservation must not perform the functions specified in subsection 1(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

[30] Section 30(3) provides further qualification to the constraint under s 30(2) by stating:

> (3) However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control aquaculture activities for the purpose of avoiding, remedying, or mitigating the effects of aquaculture activities on fishing and fisheries resources.

General comment on the preconditions within the clause

[31] It is clear from the preconditions in clause s 30(2) that its effect is particularly limited. We accept the submissions of the Attorney-General that all preconditions contained within that clause would need to apply before it would limit jurisdiction of a regional council under the RMA. Furthermore, it is subject to direct derogation by s 30(3), which explicitly provides that such controls, at least under (1)(d), can be imposed for aquaculture activities.

[32] When compared with the wording of s 6 of the Fisheries Act, we reach the following conclusions:

(a) the limitation on the power under s 30(2) RMA in relation to fishing or fisheries is intended to be proscribed;

(b) s 6 contemplates that, even then, provisions might be included in a plan which allocate particular aspects of the fishing resources (and are therefore unenforceable);

(c) that s 30(2) may be a matter to be had particular regard to as part of the assessment of the merits of provisions within the plan, rather than a limit on jurisdiction.

[33] The reason we make this last comment is the use of the words towards the end of s 30(2) which speak of "the purpose of managing fishing or fisheries resources". Section 8(1) of the Fisheries Act speaks of the purpose of this "Fisheries Act" to "provide the utilisation of fisheries resources while ensuring sustainability". Thus the purpose suggested in s 30(2) is not that directly from the Fisheries Act, but is essentially a reference to a method and measures by which the Fisheries Act achieves its purpose. This, on the face of it, indicates that the purpose of concern to the

legislators was seeking to prevent a parallel control of fishing and fishing resources equivalent to that under the Fisheries Act. That may be the purpose of the reference to "means" or "method" rather than a purpose per se.

Analysis of s 30(2)

[34] Subject to that general comment, all parties agreed that each of the preconditions of s 30(2) would need to be met. The first is whether or not the appellant, in seeking controls in the RCEP relating to biological diversity or under s 6(e) of the Act, is for a function under s 30(1)(d)(i), (ii) and (v) of the RMA. The core submission for both the Attorney-General and the Regional Council was that the power of the Regional Council under s 30(1)(ga) can only be exercised through ss 1(d)(i) to (vii).

[35] The argument in this regard is twofold. Firstly, it is that the provisions of 30(1)(d) are the mechanisms by which provisions can be made within the plan by controlling either the water column, the surface of the water and the bed of the coastal marine area etc. Furthermore, the Council and Attorney-General are reliant on the *Challenger Scallop Enhancement Company Limited v Marlborough District Council*[4] case that the distinction between controlling the effects of a use, and controlling the use itself, is illusory.

[36] Dealing first with the *Challenger Scallop* decision, this was a decision in 1998 in relation to disputes relating to the interaction between various Acts for aquaculture management. All parties acknowledged that the legislation has been substantially changed since then, and there is now explicitly a power (in s 30(3) of the Act) providing that the Council can undertake a role in relation to adverse effects in relation to aquaculture activities.

[37] Beyond this we are not satisfied that the Court in *Challenger Scallop* was addressing the same issues that arise in this case in relation to matters that are addressed directly by other provisions within the Act. It was acknowledged that *Challenger Scallop* is not binding authority on this Court, and the parties seemed to rely on this as authority for the proposition that issues in relation to the relationship of Māori with waters and taonga under s 6(e), and particularly indigenous biological diversity under (1)(ga), were to be exercised under s 30(1)(d).

[4] [1998] NZRMA 342 at [354].

[38] Mr Pou and Mr Hovell, however, referred to a decision of the High Court in 2012 *Property Rights In New Zealand Incorporated v Manawatu-Wanganui Regional Council.*[5] That decision related to the promulgation of a combined regional policy statement and regional plan, and in particular the obligation of regional councils to establish objectives, policies and methods (including rules) for maintaining indigenous biodiversity under s 30(1)(ga). In upholding the decision of the Environment Court, the High Court discussed the relationship between (1)(ga) and the other provisions of s 30(1) (a) and (b). It needs to be kept in mind that, in that case, they were dealing with the power to protect indigenous biological diversity on land, and the comments are clearly fettered by that context. Nevertheless, the High Court dealt with the matter in some detail as follows. From paragraph [30] onwards the High Court noted:

> [30] First, s 68(1) plainly empowers the Council to make rules for the purposes of carrying out any functions conferred on it under the Act, save those in s 30(1)(a) and (b). Parliament did not see fit to also except s 30(1)(ga). By virtue of the latter provision, one of its functions is the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity. So plainly the Council may make rules in its regional plan – here the POP – for that purpose. On the face of the Act there is no basis to exclude it doing so in relation to the use of private land. There is no apparent or valid basis to assimilate the s 30(1)(ga) function within s 30(1)(a) and (b), as PRINZ submits. The passage in *Brooker Resource Management* cited earlier [at 24] and which suggests otherwise is incorrect. The function in s 30(1)(ga) also embraces controls on the use of land – as the third point made below confirms.
>
> [31] Secondly, s 30(1)(ga) creates a mandatory obligation on the part of regional councils to make objectives, policies and methods for the maintenance of indigenous biological diversity. Such methods may include rules. The Council contends that. Federated Farmers concedes that. PRINZ did likewise until the implications of its concession became plain. At the end of the day, s 68(1) confirms that. More generally, a "method" is what it says: a way of doing something. In its RMA context it may include rules. Sections 31(2), 32(4)(a), 67(2)(b) and 75(2)(b), for instance, all make that abundantly clear. Methods are not confined to rules (there may be non-regulatory methods too), but necessarily they may include rules.
>
> [32] Thirdly, it is true that s 301(c) provides that it is a function of a regional council to control the use of land for certain purposes. The maintenance of indigenous biodiversity is not expressly named within that provision. I do not however accept that it is consistent with the purpose of the 2003 amendment to read down s 30(1)(ga) so that it includes every relevant function apart from controls over the use of land. Context suggests that was not what Parliament intended. Rather, s 30(1)(ga) was located outside of s 30(1)(c) simply because that function is broader than the control of the use of land – although it

5 [2012] NZHC 1272

> may include such controls.
>
> [33] Fourthly, it is also true that s 31(1)(b)(iii) gives territorial authorities a similar function, specifically in relation to controls over the use of land. Such controls are the particular concern of territorial authorities, just as air, water and the coastal marine area (the latter on a shared basis) are the particular concern of regional councils. But the existence of a functional overlap was expressly anticipated by the legislature, as the select committee report discussed earlier demonstrates.
>
> ...

[39] The reason we have cited these provisions at some length is that we conclude they are directly apposite to the consideration of this case. Functional overlap between the Fisheries Act and the RMA was expressly anticipated by legislature. The limits of s 30(2) are intended to be a clear exposition of those limits. The attempt to "read down" section 30(1)(ga); by making it subject to the limits of (1)(d) (and therefore subject to 30(2)), are an attempt to imply provisions when express provisions have been expressly contemplated and inserted by Parliament. In particular, the latest amendment to s 30(2) took place in 2011 whereas provision (ga) was inserted in 2003.

[40] We conclude, consistent with the High Court decision, that the intent of s 30(1)(ga) is to undertake a broader assessment and to enable objectives, policies and methods to identify indigenous biological diversity issues whether they occur on land, in the coastal marine area or elsewhere. We see no proper basis on which to read down s 30(1)(ga) as subject to the limitations contained in s 30(1)(d) and subject to s 30(2). In that regard we consider that the decision of the High Court on this matter is binding authority on that point.

[41] Accordingly, we note in particular the Regional Council has identified issues, objectives and policies relating to indigenous biological diversity, and has identified within the area the subject of this appeal a number of sites which are ranked as high value (IBDA). Therefore, the question is not whether or not these values have been provided for generally. The appeal seeks that more sites be provided through the area, or that the sites are maintained through more specific methods including rules. Both of these matters are matters of merit rather than jurisdiction.

Taking, allocation or enhancement

[42] We have concluded indigenous biological diversity rules are not subject to s 30(1)(d), and therefore do not breach the first precondition of s 30(2). However, other

rules relating to relationship of Māori with taonga, for example, would be promulgated under s 30(1)(d). Accordingly, we need to consider whether the other preconditions are met under s 30(2).

[43] The second precondition of s 30(2) is controlling the taking, allocation or enhancement of fisheries. In this regard, s 6(1) would impose some limits on the ability to have enforceable provisions if there was a preference for fishing sectors or access to fisheries. Again, that is a matter of merit that would need to be considered if such outcomes were sought under the appellant's proposed plan provisions.

[44] As we understand the provisions currently sought, these seek more in the nature of restrictions generally that would apply to all fishers and/or in respect of particular methods or techniques. Jurisdictionally, it appears that if a provision were inserted in a regional plan which controlled the taking, allocation or enhancement of fisheries, s 6 would make any provisions that involved preferences covered in s 6(1) unenforceable. Accordingly, it is most unlikely that any Council, or the Court, would put in place provisions which it knew at the time would be unenforceable under s 6.

[45] As we have pointed out at the hearing and in the interim decision, the RMA itself contains checks on plan policy and rule development. Firstly, we note that the appeal itself sought only that certain areas within the overall area would be affected. Secondly, there would need to be justification under s 32 and the other provisions of the Act for the level of control. It would have to be shown to be most appropriate, which would indeed be a high test. Other methods, such as research, education, advocacy, and even support for rahui or taiapure under the Fisheries Act, are other methods that have been contemplated in other areas, and are envisaged by such things as change number 3 to the Regional Policy Statement. Mr Cooney acknowledged that such methods would not offend against the Fisheries Act in any event, and therefore must be within the scope of the appeal.

[46] There might be controls that would not necessarily offend s 6, which might relate to fishing techniques or methods as sought in this declaration. Mr Cooney provided to us a copy of the Proposed Regional Coastal Plan for New Zealand's offshore islands, the Kermadec and Sub-Antarctic Islands. This is a proposed document prepared under clause 31A of the Resource Management Act by the Minister of Conservation (and is subject to unresolved appeals). In that case, the provisions consider similar issues with the number of small islands, reefs and other features, a

number of which are identified as having significant value. In that case controls have been imposed, at least at the proposed stage, relating to vessels using heavy fuel oil, anchoring distances and the like.

[47] It seems similarly here that provisions might be inserted within a plan which may not directly relate to the fishery resource or fishing itself, but may nevertheless preclude certain actions which might have a direct or indirect effect upon fish stocks. Nevertheless, even if the provision did amount to the taking, allocation or enhancement of fisheries resources, it would need to be for the purpose of managing fishing or fisheries resources

For the purpose of managing fish or fishing resources

[48] The third precondition that is identified in s 30(2) is whether the purpose of the particular provision is managing fishing or fishing resources. We have just commented generally on this under the Fisheries Act, but it is not a method identified under the RMA.

[49] We deal first with indigenous biological diversity. Clearly, the objectives and policies already identify areas of significant biological diversity, including within the area of interest to the Rohe Moana Trust. These are identified as IBDA within the regional plan, and there are a number of them within the area of interest. It cannot, therefore, be said that the purpose of that identification had anything to do with fisheries, although as Mr Cooney points out, the fisheries may constitute some of the attributes or values recognised within that area.

[50] In this regard there was some suggestion that habitats, as used in the RMA, does not include the indigenous fauna within it. Policy 11 of the New Zealand Coastal Policy Statement, which includes specific reference to avoiding adverse effects of activities on species in (a)(i) and (ii), demonstrates that this suggestion is incorrect The RPS and RCEP also recognise the complex interrelationship of fauna, flora and habitat. As an example, we were told that, without the presence of kelp forest and fish, a number of areas around the Bay had become kina-barrens, ie nearly a monoculture of kina. In any case, there did not appear to be any serious dispute that the biodiversity and ecology of an area was affected, not only by the physical habitat, but also by the flora and fauna within it. In that regard we accept Dr RV Grace's evidence as a marine biologist with over 40 years experience.

[51] We acknowledge that it is possible that a provision in a regional plan might be stated to be imposed for one purpose, but actually have as its real purpose the managing of fishing or fisheries resources controlled under the Fisheries Act. A court would need to examine the real purposes of such a provision. If, in fact, the controls have been imposed under 1(ga), or for maintaining the relationship of Māori with their taonga, waters, sites, culture and traditions under s 6(e), or under section 8 (the Treaty of Waitangi provision); provided the rule properly reflects that purpose, then it would not be for the purpose of managing fisheries. The need for clarity of purpose is, therefore, central to the justification of particular rules.

[52] Given the cumulative requirement to meet all three preconditions in s 30(2), the purpose addresses not the effect but the intent or objective or reasons. As confirmed by the Select Committee, under the RMA fisheries might be controlled for other reasons than managing fisheries or fishing resources.

[53] Finding a clear basis in the Regional Coastal Plan issues, objectives and policies to justify any control for RMA purposes is an evaluative one. Identifying the purpose of any control would be key in developing plan provisions that do not offend s 30(2). In this regard, not only is clarity of purpose essential, but so too is a rational connection between that purpose and the particular control adopted.

[54] Nevertheless, we acknowledge the concern of Mr Cooney, and the Attorney-General, that provisions that sought more directly to control the taking of fish or fisheries will be less likely to be imposed under the RMA if there are other methods available which do not seek to do so.

[55] We received affidavit evidence and supporting papers and material before and during the hearing to inform our consideration of the legal issues. This included background on two fish species (snapper and hapuka) and their habitat, and on the "tikanga of rahui". In addition, there was reference to documents such as the fishery management plans and sustainability measures for the area. There were also hypothetical scenarios raised at the hearing, but without the benefit of cross-examination of witnesses.

[56] We acknowledge such matters go to the merits of provisions, and the likelihood of imposition of certain controls and more appropriate methods, rather than jurisdiction. Accordingly, we do not traverse these matters in our decision. Nevertheless, such

control would need to demonstrate a clear purpose under the RMA, and there would need to be a rational connection between the control (method) adopted and that purpose

The declaration itself

[57] We note that the declaration sought has been subject to amendment during the course of the hearing, and some of the concerns that the Court has identified in the course of this evaluation have come to the fore. The first is that the provisions would better limit fishing techniques or methods, rather than fishing or fishery resources directly. An example that was given is the ability to control dredging. Dredging may have a significant adverse effect on the benthic environment depending on the evidence given to the Court. Other activities that might be subject to control could be netting or anchoring, especially around toka or reefs, where they may become snagged and create an environmental problem. Further issues identified were potential contaminants from fuel (eg heavy fuel oils) or other materials entering the water and adversely affecting particular areas.

[58] We consider that these concerns can be addressed in terms of a declaration by adjusting the wording. It seems to us that the declarations can be made for matters that arise under any or all of the following:

(a) maintaining indigenous biological diversity;

(b) protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area;

(c) preserve the natural character of the coastal environment (including the coastal marine area:

(d) recognise and provide for the relationship of Māori and their culture and traditions with the ancestral waters and taonga;

(e) have particular regard to the exercise of kaitiakitanga;

(f) have particular regard to intrinsic values of ecosystems;

(g) take into account the duty of active protection of taonga, including restoration of mauri, as part of the principles of the Treaty of Waitangi.

[59] In practical terms, we consider that the first three categories are essentially the rewording of particular provisions under the Act. In our view (d) also reflects s 6(e) of the Act. Although the proposed wording in (e) is intended to reflect s 7, the addition of the words "including the tikanga of rahui" are not words which appear in the Act. We would accordingly conclude that the words "have particular regard to the exercise of kaitiatikanga" should constitute the reference.

[60] Finally (g) reflects, relatively closely, the wording of s 8 and the principles which have arisen therefrom. Furthermore, we would consider that such provisions may rely on one or more of the matters listed. Accordingly, we would conclude that the wording would need to be modified slightly to address these issues:

Outcome

[61] We conclude:

(a) that, for a rule which meets the constraint imposed in s 30(2), that rule would need to meet each of the three preconditions of the subsection;

(b) any provision achieving s 30(1)(ga) is excluded from the first precondition of s 30(2), and would therefore be within jurisdiction;

(c) whether a constraint on taking, allocation or enhancement is for the purpose of maintaining indigenous biological diversity will be a merits issue. However, where biological diversity issues have already been identified (such as IBDA areas), constraints would be within jurisdiction and not covered by s 30(2);

(d) to be enforceable, rules achieving s 30(1)(ga) would need to avoid s 6(1). Again, however, this is a matter to consider at a substantive hearing, and does not prevent a rule in a Regional Coastal Plan;

(e) a coastal rule imposed in reliance on s 6(e) or s 8 would be imposed under s 30(1)(d) and thus s 30(2) could apply, depending on meeting the other preconditions of s 30(2);

(f) therefore, a rule under s 30(1)(d) on taking, allocation or enhancement would need to:

(i) be clearly articulated to satisfy the Council (or Court on appeal) that it was for the purpose of s 6(e) of the RMA and not to manage fishing or fisheries resource; and

(ii) ensure that there is a rational connection between that control and the purpose expressed.

This purpose and rational connection to a rule can only be judged at a merits hearing, and subject to a full analysis under s 32 and any other requirements of the RMA;

(g) we note immediately that nothing in s 30(2) or 6(1) prevents methods other than rules being in the RCEP. Thus, objectives, policies and methods of education, support, encouragement or discouragement are all beyond the ambit of s 30(2) RMA or s 6(1) Fisheries Act.

Should the Court make a Declaration?

[62] There is clearly a live issue between the parties to this appeal as to how far the RCEP can go in controlling fisheries or allocation issues. It is clear that the ambit of s 30(1)(ga) being subject to s 30(1)(d) is a live issue. Given our conclusions, it must follow that a declaration on that issue is appropriate.

[63] When it comes to other aspects of the RMA, such as ss 6(c) and (e), then the control must be exercised under s 30(1)(d) and thus cannot be for the purpose of managing fishing or fisheries resources (emphasis added). That requires an evaluation of all the evidence and the proposed method, together with its connection to any rules proposed.

[64] The Council and Attorney-General submitted such a declaration would serve no useful purpose. We cannot agree.

[65] We conclude that a declaration as discussed by the Court would assist Councils in preparing regional coastal plans. The parties to this appeal would also gain guidance on the type of evidence relevant if rules are to be pursued. We conclude the

declaration would have efficacy.

[66] For the reasons we have stated, we conclude that the Declaration should issue as follows.

(1) It is lawful (intra vires) for the Council to include objectives, policies and methods (including rules) in its proposed Regional Coastal Environment Plan in spatially defined parts of the coastal marine area that avoid, limit or discourage fishing techniques or methods with a sole or dominant purpose to achieve any or all of the following:

(a) maintain indigenous biological diversity;

(b) protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area;

(c) preserve the natural character of the coastal environment (including the coastal marine area:

(d) recognise and provide for the relationship of Māori and their culture and traditions with the ancestral waters and taonga;

(e) have particular regard to the exercise of kaitiakitanga;

(f) have particular regard to intrinsic values of ecosystems;

(g) take into account the duty of active protection of taonga, including restoration of mauri, as part of the principles of the Treaty of Waitangi.

(2) "Fishing" in the above declarations is as defined in s 2 of the RMA. For clarity, it includes disturbance of the seabed for the purposes of fishing. The declarations do not relate to aquaculture activities as defined in s 2 of the RMA.

(3) There may be other provisions that are justified to avoid, limit or discourage fishing techniques or methods but are not the subject of this application for declaration. Nothing in the above excludes or limits a merits-based consideration of whether the particular proposals are appropriate in the context of the proposed Regional Coastal Environment Plan.

[67] The Court recognises that amendments to appeals might be sought as a result of this declaration, and that the iterative process before the Court might also lead to further changes at the merits hearing. We also note that the Court has not considered the particular changes sought by the appellant in relation to whether any proposed rule meets the various tests under s 32 and the other requirements of the RMA.

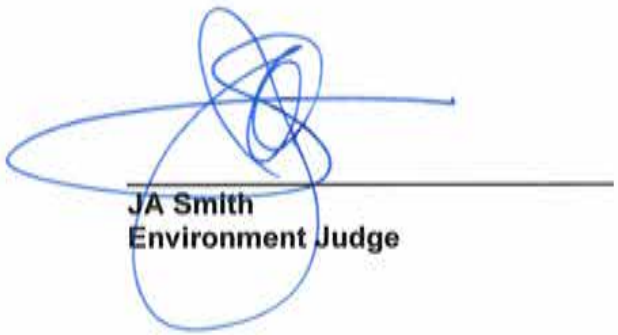
[68] The purpose of this declaration decision is to assist the parties in preparing for, and evaluating, those provisions for the purpose of the hearing. To that extent, the

existing objectives, policies and methods of the Regional Coastal Plan, in relation to cultural matters and biological diversity, will assist. It is within the framework of those settled provisions that the evaluations will occur.

Costs

[69] As noted at the hearing, this does not appear to be an appropriate case for costs. All parties agreed that there was some merit to considering the interrelationship of these provisions, and that the matter had some precedent value and was in the nature of a test case. In any event, the Court intends to reserve any question of costs until the conclusion of the substantive hearing, and parties would need to seek direction to include costs in relation to this matter at the conclusion of that hearing.

For the court:



JA Smith
Environment Judge

AMENDED WORDING FOR DECLARATIONS

1 It is lawful (*intra vires*) for the Council to include Objectives, Policies and Methods (including rules) in its Proposed Regional Coastal Environment Plan in spatially defined parts of the coastal marine area that avoid, limit or discourage fishing techniques or methods ~~in order to~~ with a sole or dominant purpose to:

(a) maintain biological diversity; or

(b) protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area; or

(c) preserve the natural character of the coastal environment (including the coastal marine area); or

(d) recognise and provide for the relationship of Maori and their culture and traditions with their ancestral waters and taonga; or

(e) have particular regard to the exercise of kaitiakitanga ~~including the~~ (for example, the tikanga of rāhui); or

(f) have particular regard to intrinsic values of ecosystems; or

(g) take into account the duty of active protection of taonga including restoration of mauri as part of the principles of the Treaty of Waitangi.

2 "Fishing" in the above declarations is as defined in s2 RMA 1991. For clarity it includes disturbance of the sea bed for purposes of fishing. The declarations do not relate to aquaculture activities as defined in s2 RMA.

3 Nothing in the above excludes or limits a merits based consideration of whether the particular proposals are appropriate in the Proposed Regional Coastal Environment Plan.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

B

Projection Information
This map is drawn on the New Zealand Map Grid Projection, a minimum error conformal projection.
Map uses 2011 aerial photography.

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2 0 2 4 6 8
Kilometres

43b_Motiti Island

Proposed Regional Coastal Environment Plan - Ecological

Published June 2015
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Bay of Plenty
REGIONAL COUNCIL

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND