MINISTRY OF FISHERIES INTERNAL GUIDELINES

PROVIDING ADVICE ON MĀTAITAI RESERVE APPLICATIONS – EFFECTS ON COMMERCIAL AND NON-COMMERCIAL FISHING

EXECUTIVE SUMMARY

Purpose

1 The purpose of these guidelines is to provide guidance to Ministry of Fisheries (MFish) staff on the process and factors to consider when assessing, and providing advice to the Minister of Fisheries (the Minister) on, whether an application for a mātaitai reserve meets the requirements of the regulations[1] relating to impact on non-commercial[2] and commercial fishers. These guidelines provide general guidance, but each case must be decided on its own merits, taking into account the relevant factors.

Relevant Legislation

2 Both the Fisheries Act 1996 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992[3] include the obligation to make regulations to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance, to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

3 The provision in regulation to apply for and be granted mātaitai reserves (if the application meets the criteria in the regulations) is a key component of the Crown meeting its obligations.

4 The criteria for the declaration of a mātaitai reserve are listed under:

(i) regulation 23 of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (the Kaimoana Regulations, and

(ii) regulation 20 of the Fisheries (South Island Customary Fishing) Regulations 1999 (the South Island Regulations).

Pre-Assessment Procedure

5 Following an application for a mātaitai reserve, the regulations require that the Minister must, after consulting with the local community, consult with those having a commercial interest in the stock(s) affected by the proposed mātaitai reserve, and have regard to the information provided by submitters when making a final decision.

6 Once consultation is complete, MFish will carry out an initial assessment of the application. Where this initial assessment indicates that it is likely the criteria in the regulations won't be met, MFish must advise the Minister of those issues, including any conditions that may be necessary to allow the mātaitai reserve to be declared. The Minister must then discuss with tangata whenua the conditions that may be necessary to address the issues raised in submissions. If those conditions change the application substantially, the Minister will re-consult on the amended mātaitai reserve application. This consultation is not specified in the regulations but is consistent with administrative law principles.

7 If, after reasonable effort, no agreement can be reached on proposed conditions, MFish will finalise the assessment of the mātaitai reserve application against the criteria, and provide final advice to the Minister regarding the declaration of the mātaitai reserve.

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[1] The two sets of regulations referred to in para 4 are collectively referred to in this document as the regulations.

[2] In the South Island Regulations this refers to the local community only; in the Kaimoana Regulations to the local community and other recreational fishers

[3] The Settlement Act

Minister's Decision – Declaration of Mātaitai Reserve

Decision making

8 The regulations state that the Minister must be satisfied that certain criteria have been met when determining whether a mātaitai reserve is to be established. The decision of the Minister is based on his/her assessment of the facts, having taken into account all the relevant factors.

Minister must be satisfied certain effects will not occur

9 The criteria contained in the regulations relate to whether commercial fishers are able to continue to take their entitlement in the relevant quota management area (QMA) for species managed under the quota management system (QMS), or fisheries management area (FMA) for non-QMS species. The criteria also relate to the ability of the local community (and non-commercial fishers under the Kaimoana Regulations) to continue to take fish for non-commercial purposes in the QMA or FMA.

Effect on the Local Community

10 Both sets of regulations require that the proposed "*mātaitai reserve will not unreasonably affect the ability of the local community to take fish, aquatic life, or seaweed for non-commercial purposes*". Under both sets of regulations, the establishment of a mātaitai reserve may affect the local community's ability to take fish, aquatic life and seaweed (fish), however the effect must go beyond the limits of what is reasonable (i.e. be unreasonable) before the proposed mātaitai reserve fails the test.

11 The '*ability*' of the local community to take fish means that consideration of the local community's situation and circumstances would need to be assessed to determine if their ability to take was impacted. For example, if there are conditions in the mātaitai reserve application that prohibit or severely restrict take by the local community, an assessment would need to be carried out to determine if there were other available areas of take that were accessible, e.g. not dangerous or excessively costly for the local community to access. The test recognises that non-commercial fishing may be prevented at a specific place, but that it can continue to occur at other places in the QMA/FMA.

Effect on Non-Commercial Fishers

12 In addition to the consideration of impact on the local community, the Kaimoana Regulations also include a requirement that the proposed mātaitai be assessed to ensure that it does not "unreasonably prevent" non-commercial take within the FMA or QMA to which the proposed mātaitai reserve relates, rather than just the local community. The use of the term 'prevent' sets a higher test than the use of the word 'affect'. The establishment of a mātaitai reserve may prevent non-commercial fisher's take, however, the effect must go beyond the limits of what is reasonable before the proposed mātaitai reserve fails the test.

'Prevent Test' – QMS Fisheries

13 The QMS provides commercial fishers with rights that have some of the characteristics of a property right (individual transferable quota - ITQ). This ITQ is a tradable right to take, through annual catch entitlement (ACE), a proportion of the specified fishery. The right does not create an entitlement to fish in any specific location within a QMA.

14 Under the regulations, the Minister must be satisfied that the proposed mātaitai reserve will not '*prevent persons with a commercial interest in a species taking their quota entitlement or*

annual catch entitlement within the QMA for that species'. If the total allowable commercial catch (TACC[4]) would not be available in the remainder of the QMA as a result of the establishment of the mātaitai reserve (including in the reasonably foreseeable future), MFish should advise the Minister to decline the application.

15 If the TACC can still be taken, or if the assessment is ambiguous, then consideration must be given to the individual circumstances of commercial fishers to determine whether any individual will be prevented from taking their ACE in the QMA. Consideration may need to be given to factors such as increased costs, the ability of fishers to relocate fishing operations outside the mätaitai reserve, and other relevant considerations where appropriate. For example, the size of an affected fisher's ITQ or ACE holding, the nature of a fisher's own circumstances when compared with other fishers in the QMA: their ability to relocate fishing activities, and an individual's fishing history in the QMA, may all be relevant considerations. To establish fishers are prevented from taking their entitlement is a high threshold – mere restriction on, or increased difficulties in, taking the entitlement is not sufficient for the application to fail the test.

16 The regulations do not preclude consideration of increased costs associated with being excluded from an area that is declared a mātaitai reserve. If the establishment of a mātaitai reserve will result in increased costs due to displacement of fishers within the QMA, or the requirement for increased effort, these may be relevant factors for considering whether one or more fishers are prevented from taking their entitlement.

17 The nature of the market also allows transfer of available ACE to fishers who can use it most effectively and efficiently. While it will not be determinative, the ability to transfer the ACE may be a relevant consideration when assessing the effect of the proposed mātaitai reserve on QMS fishers collectively, as increased costs on an individual can be mitigated through trading of ACE or ITQ (noting that there are limitations on the tradability of settlement ITQ). However, depending on the extent of increased costs on fishers, the effect of the proposed mātaitai reserve may cause a restriction that renders the rights of an individual ineffective, and may be considered prevention from taking of the entitlement. This will be a question of fact and degree.

'Prevent Test' – Non-QMS Fisheries

18 Those fishing for non-QMS species are authorised to fish in an FMA through the holding of a permit[5]. In that case, the right conferred relates to taking fish under the permit, rather than a particular ITQ or ACE entitlement. The Minister must consider if the proposed mātaitai reserve will prevent non-QMS fishers from taking permitted species in the FMA. As noted above, to establish fishers are prevented from taking their entitlement is a high threshold – mere restriction on or increased difficulties in taking the entitlement is not sufficient for the application to fail the test.

19 Under the Kaimoana Regulations the Minister must consider if the mātaitai reserve might *'unreasonably prevent'* non-QMS fishers from exercising their right, meaning that prevention may occur but only to the extent that such prevention is unreasonable, or going beyond the limits of what is reasonable.

[4] expressed as the total ACE for a stock

[5] Permits specify the area over which fish may be taken. They do not confer a right to be able to take fish in preferred areas within the area specified in the permit.

Minister must be satisfied the application meets certain criteria

20 In addition to the tests outlined above, to be successful the application must also meet five other criteria. Under the regulations the Minister '*must*' declare the area to be a mātaitai reserve if satisfied after an assessment of the facts, taking into account all relevant factors, that the criteria in the regulations are not breached. Under these criteria the Minister must be satisfied that :

- there is a special relationship between the proposed mātaitai reserve and tangata whenua
- the proposed mätaitai reserve is an identified traditional fishing ground and is of a size appropriate to be effectively managed by tangata whenua
- the general aims of management are consistent with sustainable utilisation of the fisheries
- the Minister and tangata whenua are able to agree on suitable conditions (if any) for the proposed mātaitai reserve
- the proposed mātaitai reserve is not a marine reserve under the Marine Reserves Act 1971.

21 These criteria are outlined in these guidelines, but are not addressed in detail. The guidelines focus on the criteria relating to the effects of the proposed mātaitai reserve on commercial and non-commercial fishers.

Other Relevant Considerations

Settlement Obligations

22 The 1992 Fisheries Deed of Settlement[6] was a full and final settlement of all Māori claims to commercial fishing rights. It also changed the status of non-commercial fishing rights so that they continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown, but no longer give rise to rights or interests having legal effect, except as provided through regulation.

23 The Minister's obligation under the Settlement Act, is to recommend the making of regulations:

> "*to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade*"[7].

24 Mātaitai reserves are one of a suite of management tools created under Part IX of the Fisheries Act 1996 designed to give effect to the Crown's obligations under the Deed of Settlement and the Settlement Act, and form part of the rights based fisheries framework. They are areas of special significance to tangata whenua for customary food gathering purposes, and which tangata kaitiaki/tiaki manage to achieve sustainable utilisation of the fisheries resources in that mātaitai reserve. The ability of tangata whenua to apply for and be granted mātaitai reserves, subject to the applications meeting the criteria in the regulations, is an essential component of the Crown's response to achieve its obligations.

Cumulative effects

25 The cumulative impact of multiple existing closures (aquaculture management areas, marine reserves, mātaitai reserves, taiapure, etc) may be a relevant consideration for assessment of an

[6] The Deed of Settlement
[7] Section 10(c) Settlement Act

application. The test set out in the regulations does not specifically require that those closures (or the potential for such areas to be created in the future) must be taken into account – rather it is whether the addition of a mātaitai reserve to existing closures will prevent commercial and non-commercial entitlement from being taken.

26 Equally there is no prohibition against multiple mātaitai reserves being applied for and established in a QMA or FMA; however, the potential exists that as each additional mātaitai reserve (or other area closure or restriction) is established, at some point the impact of a proposed mātaitai reserve will result in fishers not being able to take their entitlement in some or all species, and the criteria in the regulations not being met.

PROVIDING ADVICE ON MĀTAITAI RESERVE APPLICATIONS – EFFECTS ON COMMERCIAL AND NON-COMMERCIAL FISHING

1.0 Purpose

27 The purpose of these guidelines is to provide guidance to MFish staff on the process and factors to consider when assessing, and providing advice to the Minister on, whether an application for a mātaitai reserve meets the requirements of the regulations relating to impact on non-commercial[8] and commercial fishers. It provides general guidance, but each case must be decided on its own merits, taking into account the relevant factors.

2.0 Background

2.1 Fisheries Deed of Settlement

28 The Deed of Settlement between the Crown and Māori, signed on the 23rd of September 1992, marked the resolution of an historical grievance in respect of Māori fishing claims. The agreement provided for full and final settlement of commercial fishing rights and interests of Māori, including any commercial aspect of traditional fishing rights and interests. The Deed of Settlement does not extinguish the non-commercial fishing rights and interests of Māori.

29 Through the Deed of Settlement, the Crown recognises that traditional fisheries are of importance to Māori and the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries through regulation.

30 The Settlement Act was enacted to give effect to the agreements expressed in the Deed of Settlement. Section 10 (a) of the Settlement Act states that claims by Māori in respect of non-commercial fishing:

> "*shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown*", and
>
> *"The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall –*
>
> *(i) consult with tangata whenua about; and*
>
> *(ii) develop policies to help recognise –*

[8] In the South Island Regulations this refers to the local community only; in the Kaimoana Regulations to the local community and other recreational fishers

use and management practices of Māori in the exercise of non-commercial fishing rights.[9]*"*

31 Under section 10(c) of the Settlement Act, the Minister must recommend the making of regulations:

"*to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mātaitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade*".

32 The Settlement Act places an ongoing obligation on the Minister, acting in accordance with the principles of the Treaty of Waitangi, to consult with tangata whenua about, and develop policies to help recognise, the use and management practices of Māori in the exercise of non-commercial fishing rights. The Kaimoana and South Island Regulations are an essential component of meeting these obligations.

2.2 Treaty Obligations

33 The Treaty created an enduring relationship of a fiduciary nature[10] akin to partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably toward each other. The duty on the Crown is not passive. It requires the Crown to take active and positive steps for the protection of Māori taonga[11].

34 MFish should avoid the creation of new grievances through the failure to fulfil these obligations, particularly in the fisheries environment where there is a full and final settlement as outlined above.

35 The Crown has a moral obligation to maintain the integrity and legitimacy of the fisheries settlement, and a legal obligation to meet the requirements of the Settlement Act. If it fails to do so, the Crown is open to further Treaty-based claims. The integrity and legitimacy of the fisheries settlement hinges on the overall integrity of our fisheries management system, including the QMS, and the provisions governing customary and recreational fishing.

36 Under the Deed of Settlement Māori became ITQ holders and their rights are no more and no less than those of non-Māori ITQ holders. The Minister is obliged to give them the same consideration as all other ITQ holders[12]. However, it should be noted that there are limitations on the transfer of settlement ITQ (ie it can only be sold to other MIOs and Te Ohu Kaimoana, and cannot be gifted).

37 The inclusion of the tests in paragraph (1)(e)(ii) of the regulations[13] in regard to mātaitai reserves gives reasonable protections for existing ITQ holders in an area and should therefore address issues regarding impact on the commercial part of the Deed of Settlement. Decisions made in respect of mātaitai reserve applications are reviewable both through judicial review and by the Waitangi Tribunal under the Treaty of Waitangi Act 1975[14].

[9] s10(b) Settlement Act
[10] Where one side is in a position of power, the other side must rely on their integrity and good faith.
[11] Property, anything highly prized – Williams Māori Dictionary.
[12] Court of Appeal Judgement – NZ Fishing Industry Association v Ministry of Fisheries – the "Snapper 1" Case (CA82/97)
[13] Regulation 23 of the Kaimoana Regulations and Regulation 20 of the South Island Regulations
[14] s6 – Jurisdiction of Tribunal to consider claims

2.3 ITQ and ACE

38 The reference to ITQ and ACE in terms of the test contained in the regulations reflects provisions in the Fisheries Act 1983. Under the Fisheries Act 1996, ITQ generates ACE, which enables fishers to harvest fish without paying deemed values. The total ACE for a stock is equivalent to the TACC for that stock in any year.

39 The 'taking' of the entitlement relates to the taking or harvesting of fish, aquatic life, or seaweed (fish) under the authority of ACE which, in turn, is generated from ITQ.

2.4 Compensation

40 Section 308 of the Fisheries Act 1996 protects the Crown from liability to pay compensation in relation to the exercise of certain powers under the Act, though not expressly in relation to decisions establishing a mātaitai reserve. While ITQ has some of the characteristics of a property right, the courts have stated that the rights inherent in ITQ are not absolute and are subject to the provisions of the legislation establishing them. The legislation also provides for the establishment of regulations to provide for customary fishing. The tests in the regulations relating to mātaitai reserves seek to recognise the rights associated with ITQ and protect them from unreasonable impingement. These tests mean that it is unlikely that the level of impact caused by a mātaitai reserve approved by the Minister would be sufficient to make a case for compensation.

41 The Minister should be informed where there is a risk that compensation will be sought, or if exceptional and unforeseen circumstances exist that make it appropriate that compensation should be considered. It should be clear, however, that this is not a relevant consideration for the decision on whether or not to declare the mātaitai reserve.

3.0 Declaration of a Mātaitai Reserve

42 Mātaitai reserves are customary fishing grounds of special significance to tangata whenua for food gathering purposes, and are managed by tangata kaitiaki/tiaki to achieve the sustainable utilisation or sustainable management of the fisheries resources in that mātaitai reserve.

43 The legislative requirements (see section 4) specific to mātaitai reserves, including their establishment, are set out in the Kaimoana Regulations and the South Island Regulations. These regulations are similar, with one set applying to South Island fisheries waters, and the other to the remainder of New Zealand fisheries waters[15]. The main difference is that the South Island Regulations apply to the customary food gathering of fisheries resources in freshwater as well as the marine environment, while the Kaimoana Regulations only apply to food gathering in the marine environment. There are some differences in the wording of the two sets of regulations (see Table 1), which in some cases require slightly different approaches on the part of MFish and the Minister.

44 The criteria relating to the declaration of a mātaitai reserve are stated under regulation 23 of the Kaimoana Regulations and regulation 20 of the South Island Regulations. Along with the criteria on the effects of the proposed mātaitai reserve on recreational and commercial fishers, there are other criteria and procedural issues to consider under those regulations. Under these criteria the Minister must be satisfied that:

- there is a special relationship between the proposed mātaitai reserve and tangata whenua

[15] Note this is currently under review.

- the proposed mätaitai reserve is an identified traditional fishing ground and is of a size appropriate to effective management by tangata whenua
- the general aim of management is consistent with sustainable utilisation of the fisheries
- the Minister and tangata whenua are able to agree on suitable conditions (if any) for the proposed mātaitai reserve
- the proposed mātaitai reserve is not a marine reserve under the Marine Reserves Act 1971.

45 These criteria are outlined in these guidelines, but are not addressed in detail. The guidelines focus on the criteria relating to the effects of the proposed mātaitai reserve on commercial and non-commercial fishers.

4.0 Relevant Legislation

4.1 Fisheries Act 1996

Section 2. *"Interpretation—*

(1) In this Act, unless the context otherwise requires,—…

``Fishing''—

(a) Means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(b) Includes—

(i) Any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(ii) Any operation in support of or in preparation for any activities described in this definition:"

``Taking'' means fishing; and ``to take'' and ``taken'' have a corresponding meaning:

Section 5. *"Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992—*

This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—

(a) New Zealand's international obligations relating to fishing; and

(b) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992."

Section 186. *"Regulations relating to customary fishing—*

(1) The Governor-General may from time to time, by Order in Council, make regulations recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mātaitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade…"

4.2 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

Section 10. *"Effect of Settlement on non-commercial Māori fishing rights and interests—*

It is hereby declared that claims by Māori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983—

(a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto

(b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall—

(i) Consult with tangata whenua about; and

(ii) Develop policies to help recognise—

use and management practices of Māori in the exercise of non-commercial fishing rights; and

(c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mātaitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but

(d) The rights or interests of Māori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly—

(i) Are not enforceable in civil proceedings; and

(ii) Shall not provide a defence to any criminal, regulatory, or other proceeding,—

except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983."

4.3 Fisheries (Kaimoana Customary Fishing) Regulations 1998

Regulation 2. *"Interpretation—*

(1) In these regulations, unless the context otherwise requires,—…

``Local community'' means those persons—

(a) Who own any land in the proximity of a proposed mātaitai reserve; or

(b) Who—

(i) Have a place of residence in the proximity of the proposed mātaitai reserve; and

(ii) Have been in occupation for a cumulative period of no less than 3 months in the 3 consecutive years immediately preceding the date of the application for that mātaitai reserve:"

Regulation 23. *"Declaration of mātaitai reserve—*

(1) Subject to regulations 20, 21, and 22, the Minister must, by notice in the Gazette, declare an area to be a mātaitai reserve if satisfied that—

(a) There is a special relationship between tangata whenua making the application and the proposed mātaitai reserve; and

(b) The general aims of management specified on the application under regulation 18 are consistent with the sustainable utilisation of the fishery to which the application applies; and

(c) The proposed mātaitai reserve is an identified traditional fishing ground and is of a size appropriate to effective management by tangata whenua; and

(d) The Minister and the tangata whenua are able to agree on suitable conditions (if any) to address issues raised by submissions, for the proposed mātaitai reserve; and

(e) The mātaitai reserve will not—

(i) Unreasonably affect the ability of the local community to take fish, aquatic life, or seaweed for non-commercial purposes; or

(ii) Prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species; or

(iii) Unreasonably prevent persons with a commercial fishing permit for a non-quota management species exercising their right to take fisheries resources under their permit within the area for which that permit has been issued, or

(iv) Unreasonably prevent persons taking fish, aquatic life, or seaweed for non-commercial purposes within the fisheries management area or quota management area to which the mātaitai reserve relates; and

(f) The proposed mātaitai reserve is not a marine reserve under the Marine Reserves Act 1971.

(2) If the Minister considers that an application for a mātaitai reserve under regulation 18 does not meet 1 or more of the criteria in subclause (1), the Minister must decline the application as soon as reasonably practicable and, in any case no later than 30 working days after the date of the Minister's decision to decline the application, the Minister must notify the applicant in writing of the decision and the reasons for the decision.

(3) If the Minister declares a mātaitai reserve under subclause (1), the Minister must cause an appropriate notice to be published in the Gazette as soon as possible.

(4) Non-compliance with any time period in regulation 19, or regulation 20, or regulation 21 does not prevent the Minister declaring a mātaitai reserve in accordance with this regulation."

4.4 Fisheries (South Island Customary Fishing) Regulations 1999[16]

Regulation 20. *"Declaration of mātaitai reserve—*

(1) Subject to regulation 19, the Minister must, by notice in the Gazette, declare an area to be a mātaitai reserve if satisfied that—

(a) There is a special relationship between the tangata whenua making the application and the proposed mātaitai reserve; and

(b) The general aims of management specified in the application under regulation 17 are consistent with the sustainable management of the fishery to which the application relates; and

[16] The definition of "local community" is the same as in the Kaimoana Regulations.

(c) The proposed mātaitai reserve is an identified traditional fishing ground and is of a size appropriate to effective management by the tangata whenua; and

(d) The Minister and the tangata whenua are able to agree on suitable conditions for the proposed mātaitai reserve; and

(e) The proposed mātaitai reserve will not—

(i) Unreasonably affect the ability of the local community to take fish, aquatic life, or seaweed for non-commercial purposes; or

(ii) Prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species; or

(iii) Prevent persons with a commercial fishing permit for a non-quota management species taking fish, aquatic life, or seaweed under their permit within the area for which that permit has been issued; and

(f) The proposed mātaitai reserve is not a marine reserve under the Marine Reserves Act 1971.

(2) If the Minister considers that an application for a mātaitai reserve under regulation 17 does not meet 1 or more of the criteria set out in subclause (1), the Minister must decline that application as soon as reasonably practicable and, in any case no later than 30 working days after the date of the Minister's decision to decline the application, the Minister must notify the applicant in writing of that fact and state the reasons for declining.

(3) Non-compliance with any time period specified in regulation 18 or regulation 19 does not prevent the Minister declaring a mātaitai reserve in accordance with this regulation.

(4) If the Minister declares a mātaitai reserve under subclause (1), the Minister must cause an appropriate notice to be published in the Gazette as soon as practicable."

Table 1: Comparison between the two sets of regulations with regard to declaration of a mātaitai reserve.[17]

Subclauses	Kaimoana Regulation (R23)	South Island Regulation (R20)
(1)	Subject to regulations 20, 21, and 22, the Minister must, by notice in the Gazette, declare an area to be a mātaitai reserve if satisfied that;	Same wording (refers to equivalent South Island Regulations)
(1)(b)	The general aims of management specified on the application under regulation 18 are consistent with the sustainable **utilisation**[18] of the fishery to which the application applies;	The general aims of management specified in the application under regulation 17 are consistent with the sustainable **management** of the fishery to which the application relates
(1)(d)	Minister and the tangata whenua are able to agree on suitable conditions **(if any) to address issues raised by submissions**, for the proposed mātaitai reserve;	Minister and tangata whenua are able to agree on suitable conditions for the proposed mātaitai reserve
1(e)(iii)	**Unreasonably** prevent persons with a commercial fishing permit for a non-quota management species exercising their right to take fisheries resources;	Prevent persons with a commercial fishing permit for a non-quota management species taking fish, aquatic life, or seaweed
1(e)(iv)	**Unreasonably prevent persons taking fish, aquatic life, or seaweed for non-**	No equivalent subsection

[17] Note – regulations where the wording is the same have been excluded from the table
[18] Note – emphasis added to highlight differences.

	commercial purposes within the fisheries management area or quota management area to which the mātaitai reserve relates;	
(2)	"…the Minister must notify the applicant in writing of **the decision and the reasons for the decision**."	"…the Minister must notify the applicant in writing of **that fact and state the reasons for declining**."

5.0 Pre-Assessment Procedure

46 After consulting with the local community the Minister must[19], invite written submissions from fishers and ITQ holders by putting public notices in a newspaper circulating in the locality of the proposed reserve on two separate occasions. The regulations require consultation with persons having a fishing interest in the stock or stocks in the proposed mātaitai reserve (Kaimoana Regulations), or with persons who take fish, aquatic life, or seaweed or own ITQ, and whose ability to take such fish, aquatic life, or seaweed or whose ownership interest in ITQ may be affected by the proposed mataitai reserve (South Island Regulations)[20].

47 Pursuant to the information principles set out in section 10 of the Act, decisions should be based on the best available information. This means the best information that is available without unreasonable time, cost or effort. In relation to the assessment of the criteria required to establish a mātaitai reserve, MFish generally relies on information:

- provided by applicants as part of their application and subsequent dialogue during the application process;
- provided by submitters in the two rounds of consultation required under the regulations; and
- held by MFish in relation to commercial, recreational and customary entitlement and catch data.

48 Where considered necessary, MFish will seek additional information on issues that may require further investigation. These issues are not limited to those raised in submissions, but may be any information that enables the Minister to determine whether the tests in the regulations are met.

49 Once submissions have been received, MFish must analyse the submissions and carry out an initial assessment of the issues raised in submissions against all of the criteria contained in the regulations. Where this initial assessment indicates the likelihood of the criteria not being met, MFish must advise the Minister of those issues, including any possible conditions that may be necessary to address those issues. The Minister must advise tangata whenua of the submissions and discuss with them any possible conditions on the mātaitai reserve that may be necessary to address the issues raised[21].

50 The Kaimoana Regulations require that the conditions agreed to by the Minister and tangata whenua in relation to the mātaitai reserve must address issues raised in submissions. In the South Island regulation relating to the declaration of a mātaitai reserve there is no specific requirement regarding what the conditions agreed to by the Minister and tangata whenua must address. However, under regulation 19(6)(b), the Minister is required to discuss with tangata whenua any conditions that may be necessary to address issues raised in submissions. It is therefore

[19] Regulation 21 of the Kaimoana Regulations and regulation 19 South Island Regulations
[20] Rather than with 'persons or organisations as the Minister considers are representative' as required under s12 of the Fisheries Act.
[21] R22 (b) & R23(1)(d) Kaimoana Regulations, and R19 (6)(b) South Island Regulations

reasonable to expect that conditions will address issues raised in submissions that are relevant to the criteria in the regulations. In either case conditions may be agreed to that would allow the mātaitai reserve application to proceed, where it otherwise would not, or to address other issues that concerned submitters.

51 Any conditions agreed to must be consistent with the regulations and the principles of the Act. Conditions cannot fetter the subsequent regulatory or bylaw processes set out in the regulations. For example, the Minister and applicants could agree to a condition stating that the applicants will request, and the Minister will recommend, regulations to reinstate commercial fishing. However, a condition could not reinstate commercial fishing without regulations being promulgated, nor could it reinstate activities in preparation for or in support of commercial fishing.

52 The Minister can also agree conditions to ensure that the other conditions (proposed to allow the application to be approved) are met. The Minister can take action under the regulations to ensure tangata kaitiaki/tiaki are managing the mātaitai reserve in accordance with conditions, including cancelling the appointment of tangata kaitiaki/tiaki.

53 To assist the Minister to meet the obligation to try to reach an agreement on suitable conditions, MFish must provide initial advice based on analysis of the submissions and an assessment of whether the application, as consulted on, meets the criteria set out in the regulations. MFish will identify issues that need to be addressed through conditions to mitigate the effects of the mātaitai reserve. The Minister's agreement with tangata whenua on conditions does not fetter his/her final decision. If those conditions change the impact of the proposed mātaitai reserve substantially, the Minister may need to re-consult on the amended mātaitai reserve application.

54 Once conditions are agreed, or if no agreement can be reached (after reasonable effort) on conditions, MFish will finalise the assessment of the mātaitai reserve application against the criteria contained in the regulations to provide final advice to the Minister regarding the declaration of the mātaitai reserve. MFish final advice to the Minister on the mātaitai reserve application should take into account any conditions agreed between the Minister and tangata whenua.

6.0 Minister's Decision – Declaration of Mātaitai Reserve

6.1 Minister must be satisfied certain effects will not occur

55 There are criteria in both sets of regulations that focus on the effect of the proposed mātaitai reserve on:

(i) non-commercial fishing;

(ii) commercial fishing for QMS stocks; and

(iii) commercial fishing for non-QMS species.

6.1.1 Effect on Local Community

56 The regulations require that the proposed "*mātaitai reserve will not unreasonably affect the ability of the local community*[22] *to take fish, aquatic life, or seaweed for non-commercial purposes*".

[22] The 'local community' is defined in the regulations (see section 4.3 above), and 'take' is defined in the interpretation provisions of the Fisheries Act 1996 (see section 4.1 above).

57 This means that the local community's situation and circumstances would need to be assessed to determine if their ability to take fish was impacted. For example, if there are conditions in the mātaitai reserve application that prohibit or severely restrict take by the local community, an assessment would need to be carried out to determine if there were other available areas that were accessible, e.g. not dangerous or excessively costly for the local community to access.

58 The use of the phrase 'unreasonably affect' means that establishment of a mātaitai reserve may affect the local community's ability to take or prevent non-commercial fisher's take, but the effect must go beyond the limits of what is reasonable (i.e. be unreasonable) before the proposed mātaitai reserve fails the test in the regulations.

59 Non-commercial fishing (whether by the local community or other fishers) may not be affected by the declaration of a mātaitai reserve. However, bylaws may later be proposed that would have an impact on the local community's ability to take. These would need to be assessed against the same criteria before the Minister decided whether or not to approve the bylaw.

6.1.2 Effect on other non-commercial Fishers

60 The Kaimoana Regulations include an additional requirement that the Minister be satisfied that '*the proposed mātaitai reserve will not unreasonably prevent persons taking fish, aquatic life, or seaweed for non-commercial purposes within the FMA or QMA to which the mātaitai reserve relates'*. The use of the term 'prevent' sets a more stringent test than the use of the word 'affect'. To establish fishers are prevented from taking their entitlement is a high threshold – mere restriction on or increased difficulties in taking the entitlement is not sufficient for the application to fail the test.

61 In assessing whether non-commercial fishers who are not part of the local community are 'unreasonably prevented', the assessment could include consideration of the likelihood that these fishers have access to other fishing grounds within the QMA or FMA.

6.1.3 Effect on Commercial Fishing

62 The effect of the proposed mātaitai reserve on commercial fishing in the area is separated into two tests in the regulations – a test of the impact on persons with a commercial interest in taking QMS stocks, and a test of the impact on commercial fishers taking non-QMS species. In the regulations less impact or restriction is allowable on persons with a commercial entitlement to QMS stocks (through the use of the word 'prevent') than those with an interest in non-QMS species (through the use of the term 'unreasonably prevent'). In the case of non-QMS fisheries, prevention may occur but the impact must go beyond what is 'reasonable' before the proposed mātaitai will fail the test.

63 The 'prevent' test contained in the regulations applies to both QMS and non-QMS fisheries. The use of the words 'will not' and 'prevent' is explicit language. The definition of 'prevent' is not given in the regulations or the Fisheries Act. However, taking its ordinary meaning, 'prevent' means to stop from happening or doing something, or make impossible. Therefore the Minister must consider if the mātaitai reserve prevents fishers taking their entitlement. To establish fishers are prevented from taking their entitlement is a high threshold – mere restriction on or increased difficulties in taking the entitlement is not sufficient to fail the test.

6.1.4 'Prevent Test' – QMS Fisheries

64 ITQ generates a right to harvest a particular quantity of fish in a specific QMA. This is subject to statutory limitations whereby the Minister can alter the parameters of the right, e.g. TACC levels or s11 sustainability measures, in carrying out some functions under the Fisheries

Act. Providing a spatial priority to another group of fishers through a mātaitai reserve does not necessarily have an adverse effect on the rights associated with ITQ since ITQ rights do not relate to any specific location within the QMA, but provide a right to take a certain amount of a specified species within the entire QMA.

65 The test relates to the ability of fishers to take their entitlement under the TACC, but may also involve assessment of any reasonably foreseeable effects of the mātaitai reserve in the future. This will depend on the level and accuracy of any information available. For example, where the mātaitai reserve leads directly to a reduction of the TACC[23] for that QMA, the prevent test would be breached.

66 There may be instances where the ITQ right is for a sedentary species or a species that congregates in particular zones within an area. In such circumstances it is possible that the creation of a mātaitai reserve may have a direct impact on at least some of the fishers who normally fish in that particular area. If the effect is that greater effort is required to take the entitlement in the remainder of the QMA then in most cases it is doubtful that this would be a sufficient impact to fail the test. If, however, it was no longer possible to take the entitlement solely because certain areas have been placed under the mātaitai reserve, then the take of entitlement has been prevented. The Minister must be satisfied that commercial fishers would be prevented, not just restricted to some extent, from taking their entitlement in the QMA in order to decline an application.

Costs

67 The test does not preclude consideration of increased costs associated with fishers having to fish elsewhere. The establishment of a mātaitai reserve may result in an increase in fishing costs due to displacement of fishers' effort from within the area of the proposed mātaitai reserve, or the requirement for increased effort. However fishers might not be prevented from taking their entitlement elsewhere within the QMA for the stock or species.

68 In the case of QMS stocks, the nature of the market allows transfer of available ACE to other fishers so that they can use it most effectively and efficiently. This is relevant to the consideration of costs as a fisher with existing vessels/equipment may face increased costs to continue taking their entitlement, but the transfer of ACE or ITQ may (depending on the circumstances) provide revenue to mitigate those effects at a collective level. Though the limitations on trade of settlement ITQ would also need to be considered. However, at an individual level, depending on the extent of increased costs on fishers, the effect of the proposed mātaitai reserve may cause a restriction that may be considered prevention from the taking of their entitlement. This will be a question of fact and degree.

69 If the result of the establishment of a mātaitai reserve was that fishers for QMS stocks were physically prevented from taking the TACC, (i.e. it was not available within the remaining QMA), or if the increase in costs or effort were such that it rendered the right ineffective, the Minister should be advised to decline the application.

70 If the TACC can still be taken, or if the assessment is ambiguous then consideration must be given to the individual circumstances of commercial fishers to determine whether they will be prevented from taking their entitlement elsewhere in the QMA. A range of factors should be considered and balanced in making this assessment of individual circumstances. Consideration should be given to factors such as increased costs, the ability of fishers to relocate fishing

[23] Being the total available ACE

operations outside the mātaitai reserve, and an individual fisher's circumstances compared to others in the QMA such as the size and nature of an individual's ITQ entitlement or ACE.

71 For example:

(i) where one or more fishers would face unreasonable costs to re-organise their fishing operation to take their entitlement elsewhere in the QMA as a result of the mātaitai reserve then (all things being equal) the "prevent test" would likely be breached

(ii) where a fisher could without unreasonable costs take their entitlement elsewhere in the QMA but chose not to do so and other fishers can still take their entitlement, then the "prevent" test would be less likely to be breached.

72 Fishers must be prevented from taking their entitlement, either through unavailability of the species outside the proposed mātaitai reserve or through facing significantly higher costs to relocate fishing effort, for the Minister to decline an application under this criterion. As long as fishers are considered to be able to take their entitlement given the tests outlined above, this criterion will not impede the declaration of a mātaitai reserve.

6.1.5 'Prevent Test' – Non-QMS Fisheries

73 In the case of non-QMS commercial species, fishers are authorised to 'take' through the holding of a permit. In that case prevent would refer to taking fish under a permit within an FMA, rather than a particular ITQ or ACE entitlement. As outlined above, to establish fishers are prevented from taking their entitlement is a high threshold – mere restriction on or increased difficulties in taking the entitlement is not sufficient for the application to fail the test.

74 There is a different test in the Kaimoana Regulations for non-QMS fishers, where the test is that the mātaitai reserve would 'unreasonably prevent' fishers from taking fish under their permit. The use of the term 'unreasonably prevent' makes it less likely that the test will be breached, and the mātaitai declined. Under the Kaimoana Regulations the proposed mātaitai reserve may prevent non-QMS fishers exercising their right to take, provided the prevention is not unreasonable. In non-QMS commercial fisheries where there are commercial catch limits, the measure of being unreasonably prevented can occur against the quantum they are entitled to take.

6.2 Minister must be satisfied application meets certain criteria

75 In addition to the tests outlined above, to be successful the application must also meet four other criteria. Under the regulations the Minister *must* declare the area to be a mātaitai reserve if satisfied after an assessment of the facts, taking into account all relevant factors, that the criteria in the regulations are not breached.

76 These other criteria can be summarised as:

Subclause 1(a): There is a special relationship between tangata whenua and the proposed mātaitai reserve – tangata whenua must provide information on the nature of the special relationship when applying for the mātaitai reserve. Relevant considerations may include the spatial extent of the area and the iwi's whakapapa to the site.

Subclause 1(b): The general aims of management are consistent with sustainable utilisation (Kaimoana Regulations) or sustainable management (South Island Regulations) of the fishery. While it is possible that the different wording ('management' and 'utilisation') was intended to have different effects, in practice the concepts address similar outcomes and any differences are likely to be minimal.

Sustainable management of the resource relies on managing use sustainably.

Sustainable utilisation is not defined under the regulations; however, they are promulgated under the Fisheries Act 1996 where:

- ensuring sustainability means:
    a) maintaining the potential of fisheries resource to meet the reasonably foreseeable needs of future generations; and
    b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment; and
- utilisation means:

    conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

Subclause 1(c): The proposed mātaitai reserve is an identified traditional fishing ground and is of a size appropriate to effective management by tangata whenua. Tangata whenua must provide information identifying the area as a traditional fishing ground when applying for the mātaitai reserve. This means that the applicants must provide adequate evidence, relating to specific locations where particular species are taken, for the Minister to be satisfied that this is the case. There is no limit on the size of the proposed mātaitai reserve. However, the size must allow for tangata whenua to manage the area effectively, that is, sustainably and consistent with the aims of management outlined in the application. This may involve considerations of the appropriateness of the size in relation to the special relationship outlined in subclause (1)(a), and in relation to the ability of kaitiaki to supervise access to the area.

Subclause 1(d): The Minister and tangata whenua to agree on suitable conditions (if any) for the proposed mātaitai reserve. The Kaimoana Regulations specify that the conditions are to address issues raised by submissions. In the South Island regulation relating to the declaration of a mātaitai reserve there is no specific requirement regarding what the conditions agreed to by the Minister and tangata whenua must address. However, under regulation 19(6)(b) of the South Island Regulations, the Minister is required to discuss with tangata whenua any conditions that may be necessary to address issues raised in submissions. It is therefore reasonable to expect that conditions will address issues raised in submissions that are relevant to the criteria in the regulations. As noted above, the conditions that the Minister and tangata whenua may agree on for the proposed mātaitai reserve could address issues that may otherwise result in the Minister declining the application, including the tests within subclause (1)(e) of both sets of regulations (as outlined in section 6.1 above).

Subclause 1(f): The proposed mataitai reserve is not a marine reserve under the Marine Reserves Act 1971. A mātaitai reserve may be proposed adjacent to a marine reserve if their boundaries do not conflict with each other. Should any part of an application for a mātaitai reserve overlap a marine reserve, the boundaries of the proposed mātaitai reserve must be amended, or the application would have to be declined.

7.0 Other Relevant Considerations

7.1 Settlement Act

77 Regulation 3(3) of both sets of regulations provides that any person exercising functions, duties, or powers under these regulations must do so in accordance with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Accordingly, in determining whether or not to establish a mātaitai reserve regard must be had to the provisions of that Act.

78 The Deed of Settlement between the Crown and Māori, signed on the 23rd of September 1992, marked the resolution of an historical grievance in respect of Māori fishing claims. The agreement provided for full and final settlement of commercial fishing rights and interests of Māori, including any commercial aspect of traditional fishing rights and interests. Through the Deed of Settlement the Crown recognises that traditional fisheries are of importance to Māori and the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries through regulation. The Deed of Settlement does not extinguish the non-commercial fishing rights and interests of Māori.

79 The Settlement Act was enacted to give effect to the agreements expressed in the Deed of Settlement. Section 10 (a) of the Settlement Act states that claims by Māori in respect of non-commercial fishing:

> "*shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown*", and
>
> > *"The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall - (i) consult with tangata whenua about; and (ii) develop policies to help recognise – use and management practices of Māori in the exercise of non-commercial fishing rights."*

80 Under section 10(c) of the Settlement Act, the Minister shall recommend the making of regulations:

> "*to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade*".

81 Under section 186 of the Fisheries Act 1996, the Crown has enacted regulations consistent with section 10(c) of the Settlement Act. The regulations were also developed to fulfil the commitment in section 10(b) of the Settlement Act - to develop policies and recognise use and management practices of Māori in respect of customary non-commercial fishing. The regulations help fulfil the commitment given by the Crown in the Settlement Act, and sections 5 and 186 of the Fisheries Act 1996. For the Settlement to be successful, the benefits offered by the Crown through the regulations, must be seen to have been provided through the establishment of mātaitai reserves where they don't breach the criteria in the regulations.

7.2 Fisheries Act 1996

82 Different forms of rights to fisheries resources co-exist under the Fisheries Act 1996 and serve as a means of giving effect to the purpose of the Act – "*to provide for the utilisation of fisheries resources while ensuring sustainability*". Mātaitai reserves provide for the collective rights of tangata whenua to exercise customary use and management practices in areas of special

significance. Mātaitai reserves are one of the suite of management tools created under Part IX of the Fisheries Act 1996 designed to give effect to the Crown's Treaty duty, as stated in the Settlement Act, and form part of the rights based fisheries framework.

83 The Crown has an interest in ensuring that the mechanisms in the regulations are compatible with the wider fisheries management framework. However, the regulations made for the express purpose of recognising and providing for customary food gathering and the special relationship between tangata whenua and those places which are of customary food gathering importance[24], which must not be rendered a nullity by the application of other aspects of the framework.

84 Other parts of the Fisheries Act may also be relevant considerations in assessing an application, for example the purpose of the Act and sections 9 (environmental principles) and 10 (information principles).

7.3 Cumulative Effect

85 Cumulative effects of multiple area closures and restrictions associated with other uses (aquaculture management areas, marine reserves, mātaitai reserves, taiapure, etc) may result in the criteria not being met. The test set out in the regulations is not that those area closures (or the potential for such areas to be created in the future) must be taken expressly into account – rather it is whether the addition of a mātaitai reserve to existing measures will prevent other fishers from continuing to fish as outlined in section 6.1 above. There is no prohibition against multiple mātaitai reserves in a QMA or FMA; however, the potential exists that as each additional mātaitai reserve (or other area closure or restriction) is established, at some point a proposed mātaitai reserve will result in the criteria in the regulations not being met.

8.0 Bylaws[25]

86 Once a mātaitai reserve has been established, the tangata tiaki/kaitiaki of a mātaitai reserve[26] may propose bylaws restricting or prohibiting the taking of fisheries resources from the whole or any part of a mātaitai reserve. The restrictions may be for any purpose considered necessary for the sustainable management of the fisheries resources in that mātaitai reserve. Any bylaws or regulations imposed within the mātaitai reserve to manage the area sustainably apply to all non-commercial fishers (i.e. customary non-commercial and recreational fishers).

87 The Minister must decide whether or not to approve the bylaw(s), and there is little express guidance in the regulations as to what matters must be considered in making that decision. However, the Minister would consider the criteria that the mätaitai reserve was assessed against as relevant to his or her decision here. There may be other relevant considerations, such as any existing controls in the mätaitai reserve on fishing (including any existing regulations reinstating commercial fishing).

[24] to the extent that such food gathering is not commercial in any way nor involves pecuniary gain or trade
[25] Note that there are a number of processes that must occur following the Minister's decision on an application, e.g. declaration and notification of the reserve. These are not covered in this policy.
[26] Nominated by tangata whenua and appointed by the Minister