

## SECTION 6: COMPARATIVE DEVELOPMENTS OVERSEAS

### New Zealand

In New Zealand, the English version of Treaty of Waitangi guarantees to Maori the 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess'. On the other hand, the Maori version (translated) provides that the Queen of England had agreed 'to give to the chiefs, the sub-tribes and all the Maori people of New Zealand the full authority of their lands, those places where the fires burn and all those things important to them'.<sup>334</sup> Between 1877 and 1986 Maori fishing rights were simply exempted from the operation of fisheries legislation, and Treaty rights were considered unenforceable.<sup>335</sup> In 1986 in the case of *Te Weehi v. Regional Fisheries Officer*,<sup>336</sup> Williamson J of the New Zealand Supreme Court recognised a customary (*takanga* Maori) right to take shell-fish for food and held that this right provided a good defence against a charge of breaching a fisheries regulation. Emphasis was placed on the fact that the defendant, a member of the Ngai Tahu tribe, had permission from the Ngati Porou tribe to take shellfish in the area although neither tribe had ownership of the area. The customary fishing right was held to be non-territorial, non-exclusive and not a property-right.<sup>337</sup> The ruling was not based on the Treaty of Waitangi, but on the doctrine of aboriginal title.<sup>338</sup> This landmark case was not followed, however, in *Green v. Ministry of Agriculture and Fisheries*. In the *Green* case, Justice Greig J in the High Court held that any exclusive fishing right, based on ownership of the foreshore, would have been extinguished when the freehold title of the land to the highwater mark was determined, the boundaries defined and the titles granted.<sup>339</sup>

The *Treaty of Waitangi Act 1975 (NZ)* incorporated into New Zealand's domestic law the Maori and English versions of the Treaty of Waitangi. By that Act, Maori are able to challenge Crown laws, policies and practices for inconsistency with the Treaty before the Waitangi Tribunal, which as a non-judicial body can make recommendations for reform. Reviews could be sought retrospectively following amendments to the Act in 1985.<sup>340</sup> Before the *Treaty of Waitangi Act 1975 (NZ)*, the courts were reluctant to recognise the commitments of the Treaty. Fishing issues have comprised a significant part of the Tribunal's work.<sup>341</sup> Following the introduction of a quota management system for commercial fisheries in 1986, which created individual transferable quotas, some Maori groups brought complaints before the Waitangi Tribunal and the courts,<sup>342</sup> asserting their treaty rights to fisheries and seeking compensation. An interim stay on the introduction

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<sup>334</sup> Quoted and discussed in S. Davidson, 'The Ngai Tahu Sea Fisheries Report', *The International Journal of Marine and Coastal Law*, Vol.8, No.2, 1993, pp.300-310 at pp.300-301.

<sup>335</sup> K. Keith, 'The Treaty of Waitangi in the Courts', *New Zealand Universities Law Review*, Vol.14, 1990, pp.37-61 at p.50; M. Robinson, 'The Sealords Fishing Settlement: An International Perspective', *Auckland University Law Review*, Vol.7, No.3, 1994, pp.557-577 at 559.

<sup>336</sup> [1986] 1 NZLR 680.

<sup>337</sup> Keith, 'The Treaty of Waitangi in the Courts'..., p.50, referring also to *Ministry of Agriculture and Fisheries v. Hoki Campbell* [1989] DCR 254 and *Ministry of Agriculture and Fisheries v. Hakaria* [1989] DCR 289.

<sup>338</sup> E.T. Durie and G.S. Orr, 'The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence', *New Zealand Universities Law Review*, Vol.14, 1990, pp.62-81 at p.79.

<sup>339</sup> [1990] 1 NZLR 411.

<sup>340</sup> D.V. Williams, 'The Constitutional Status of the Treaty of Waitangi: An Historical Perspective', *New Zealand Universities Law Review*, Vol.14, 1990, pp.9-36 at p.24; A. Levy, 'Fighting over the land: The New Zealand Government's proposals for final settlement of all Maori land claims', *Alternative Law Journal*, Vol.20, No.3, 1995, pp.113-116 at p.114.

<sup>341</sup> See for example: Fishing Rights (Hawke), (Wai 1, 1978); Motonui-Waitara (Wai. 6, 1983); Kaituna River (Wai. 4, 1984); Manukau Claim (Wai. 8, 1985); Fishing Rights (Te Weehi) (Wai 15, 1987); Fishing Rights (Lake Taupo) (Wai 18, 1986); Muriwhenua Fishing (Wai 22, 1988); Fisheries Settlement Report (Wai 307, 1992) and the Ngai Tahu Sea Fisheries Report (Wai 27, 1992).

<sup>342</sup> *In Te Runanga o Muriwhenua Inc. v. Attorney-General* [1990] 2 NZLR 641 the court held that Crown Treaty obligations might be met under the *Maori Fisheries Act 1989* if the Crown transferred by instalments 10 per cent

of the quota management system<sup>343</sup> led to the negotiation and introduction of substantial changes to the *Fisheries Act 1983 (NZ)*. The *Maori Fisheries Act 1989 (NZ)* inserted a new part into the *Fisheries Act 1983*, which was intended (as an interim settlement) to better recognise Maori fishing rights in customary fisheries waters, to facilitate increased Maori participation in commercial fishing activities and to better conserve and manage the rock lobster fishery.<sup>344</sup> Under the amendments ten per cent of the fish quota for each species was to be allocated to Maori over the next four years and \$10 million was to be available to Maori (through a new Maori Fisheries Commission) to assist with commercial fishing activities.<sup>345</sup> The Waitangi Tribunal found subsequently that the 10 per cent allocation to Maori generally would not be sufficient to remedy past breaches of the Treaty by the Crown regarding Ngai Tahu's (the major South Island tribe or *iwi*) fishing rights.<sup>346</sup>

The *Maori Fisheries Act 1989* also attempted to redress Maori grievances by enabling Maori to apply to manage local fisheries or *taiapure* of high spiritual or sustenance value. According to Cassidy:

If their application to manage the area was successful, a committee of management nominated by the Maori community would be given the role of developing and recommending to the Minister of Fisheries regulations to control the activity of fishing within the *taiapure* area. Access to the *taiapure* could not be restricted on the basis of race.

In accepting the interim settlement, Maori gave equal importance to *taiapure* as an expression of their *Rangatiratanga* or traditional authority as they did to the provision of economic benefit through the transfer of quota to the Maori Fisheries Commission.<sup>347</sup>

But the fishing industry and recreational fishers have opposed the creation of *taiapure*-local fisheries, with only one being established by 1995, with four agreed to in principle.<sup>348</sup>

The Waitangi Tribunal released its Ngai Tahu sea fisheries report in August 1992.<sup>349</sup> The report did not accept the argument that under customary international law by 1840 there was an accepted limitation of a three nautical mile territorial sea, and that therefore Maori *rangatiratanga* (dominion or tribal authority) should also be limited to three nautical miles. The Tribunal found that such a rule of international law had not been mutually accepted as a constraint on Maori/Crown relations in the Treaty context; that Ngai Tahu regarded their sea fisheries as extending as far out to sea as necessary; and that there was much uncertainty about the existence of a customary international law three nautical mile limit until late into the nineteenth century.<sup>350</sup> The Tribunal recommended that the Ngai Tahu sea fishery grievance be settled with the Crown by negotiation, with an additional percentage of the fish quota to be allocated under the *Maori Fisheries Act 1989*. The Tribunal also recommended that exclusive eel fishing rights in Waihora (Lake Ellesmere) be created and that existing eel licences be cancelled. The Tribunal also endorsed a recommendation by the 1992 Sustainable Fisheries Report that the *Fisheries Act 1983 (NZ)* be amended to enable *mahinga kai* reserves for *iwi* or *hapu* to be created. The Tribunal concluded that the Ngai Tahu had an exclusive right to fish out to 12 nautical miles of their coastline, and had an exclusive tribal Treaty development right to a reasonable share of the sea fisheries

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of total allowable catches to the Maori Fisheries Commission.

<sup>343</sup> *Ngai Tahu Maori Trust Board v. Attorney-General* cited and discussed in Robinson, 'The Sealords Fishing Settlement', p.560.

<sup>344</sup> Williams, 'The Constitutional Status of the Treaty of Waitangi'..., p.30; Keith, 'The Treaty of Waitangi in the Courts'..., p.51..

<sup>345</sup> A. Frame, 'A State Servant Looks at the Treaty', *New Zealand Universities Law Review*, Vol.14, 1990, pp.82-96 at pp.92-93.

<sup>346</sup> Davidson, 'The Ngai Tahu Sea Fisheries Report', p.304.

<sup>347</sup> M. Cassidy, 'Providing for Maori Rights and Interests in New Zealand's Fisheries', *Conference paper presented at the 3rd Australasian Fisheries Managers Conference, 1-4 August 1995*, pp.1-14.

<sup>348</sup> Cassidy, 'Providing for Maori Rights'..., p.10.

<sup>349</sup> Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992 (Wai 27)*, Brooker's and Friend Ltd, Wellington, 1992.

<sup>350</sup> Davidson, 'The Ngai Tahu Sea Fisheries Report', pp.307-308.

off their coastline within the 200 nautical mile exclusive economic zone.<sup>351</sup> Various breaches of the principles of the Treaty of Waitangi were also found.

In 1992 the New Zealand Government and Maori concluded a deed of settlement concerning fisheries. This followed the earlier negotiation of a Memorandum of Understanding between the Crown and Maori, and a consultation process amongst Maori at 23 *hui* around New Zealand.<sup>352</sup> Under the Deed (embodied in the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (NZ)*) the Crown agreed to pay \$150 million to assist Maori in a joint venture purchase with Brierley Investments Ltd of Sealords Products Ltd, to give Maori 20 per cent of new species quota, and provide for management of Maori fisheries through a restructuring of the Maori Fisheries Commission.<sup>353</sup> Maori agreed to discontinue all court actions and claims before the Waitangi Tribunal concerning commercial fisheries, and to consider their commercial fishing rights satisfied. The Act 'effectively extinguished traditional Maori fishing rights in regard to commercial fisheries', using the words 'fully and finally settled, satisfied and discharged'.<sup>354</sup> Maori representation on all fish management bodies was also increased — so that 'every commercial fishing board or committee has at least one if not two Maori members'.<sup>355</sup>

Although some Maori *iwi* were critical of the deed, the Waitangi Tribunal found that a general Maori consensus was sufficient to justify the agreement. Some *iwi*, such as the Chatham Island Maori, were concerned however that their interests would not be met equitably by the Fisheries Commission. They did not ratify the Deed of Settlement, and were unsuccessful in their domestic litigation which sought to halt implementation of the Settlement.<sup>356</sup> There is now some discussion of complaints being made to the Human Rights Committee of the International Covenant on Civil and Political Rights<sup>357</sup> regarding the deed of settlement.

The Deed of Settlement and the 1992 Settlement Act both envisaged the development of regulations for non-commercial, traditional and customary fishing rights and interests.<sup>358</sup> The *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (NZ)* provided that Maori interests in non-commercial fishing for species or classes of fish, aquatic life or seaweed would be regulated by the *Fisheries Act 1983 (NZ)*, and that the Minister, in accordance with the principles of the Treaty of Waitangi, would consult and develop policies regarding Maori use and management practices for non-commercial fishing rights: s.10. To facilitate policy development an inter-departmental working group was formed, and a discussion document was produced and discussed in about 35 consultative meetings amongst Maori. In addition, Maori convened a representative organisation known as Paepae/Taumata Maori which had 50-60 members representing their tribal groups, who in turn elected four people to liaise with the Government on a Customary Fisheries Working Group to develop the new regulations, which were intended to replace existing provisions.<sup>359</sup> It was also agreed that Maori communities could seek to have local *mataitai* reserves created, which could be closed to general access when resources were insufficient. Local Maori *marae* responsible for the reserve during closed periods could authorise the taking of seafood for functions to sustain that *marae*.<sup>360</sup> As at September 1995 there were two sets of customary fisheries regulations — one developed by the Crown and one by the Paepae/Taumata sub-

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<sup>351</sup> The Waitangi Tribunal, 'Ngai Tahu Sea Fisheries Report Released', *Te Manutukutuku, Te Roopu Whakamana i te Tititi o Waitangi Panui, Waitangi Tribunal Division, Department of Justice Newsletter*, No.17, August, 1992, pp.1-2 at p.1.

<sup>352</sup> Robinson, 'The Sealords Fishing Settlement' ..., p.562.

<sup>353</sup> The Maori Fisheries Commission was subsequently renamed the Treaty of Waitangi Fisheries Commission.

<sup>354</sup> Robinson, 'The Sealords Fishing Settlement' ..., at p.565.

<sup>355</sup> Cassidy, 'Providing for Maori Rights' ..., p.9.

<sup>356</sup> See *Te Runanga o Wharekauri Rekohu Inc. v. Attorney-General* [1993] 2 NZLR 301.

<sup>357</sup> Robinson, 'The Sealords Fishing Settlement' ..., p.566.

<sup>358</sup> Robinson, 'The Sealords Fishing Settlement' ..., p.565.

<sup>359</sup> Cassidy, 'Providing for Maori Rights' ..., p.12.

<sup>360</sup> Cassidy, 'Providing for Maori Rights' ..., p.13.

group — and subsequent negotiations were intended to result in an agreed set of regulations.<sup>361</sup> Wickliffe has summarised the negotiations and outcomes to date.<sup>362</sup>

In 1995 the New Zealand Government also offered a ‘once and for all’ settlement of up to \$1 billion (including the fisheries settlement sum to settle all outstanding Maori resource claims),<sup>363</sup> but this offer has been rejected by Maori groups.<sup>364</sup> The offer extended to non-fisheries natural resources including water, river and lake beds, foreshore and seabed claims.<sup>365</sup> A new Fisheries Bill 1995 is also being developed which increases Maori involvement in fisheries management. Cassidy explains its general provisions as follows:

When the Minister is setting or varying any sustainability measures, it is proposed that she/he must provide for the input and participation of *tangata whenua* with a non-commercial interest in the stock or area concerned, having particular regard to *kaitiakitanga*.<sup>366</sup> This is in addition to the general requirement to consult with such persons or organisations as the Minister considers are representative of persons having an interest in the stock or area concerned.

The Bill specifies the matters the Minister must take into account when determining or varying any Total Allowable Commercial Catch (TACC). It is proposed that the Minister must allow for customary, non-commercial Maori interests before determining the TACC...

The Bill provides for a dispute resolution process in fisheries management...[which] does not apply to the effects of fishing authorised under Part VIII of the Bill...Part VIII of the Bill explicitly recognises and provides for Maori non-commercial fishing rights and interests through the mechanisms of *taiapure*-local fisheries and customary fishing regulations.<sup>367</sup>

## Canada

The native fisheries rights situation in Canada and the United States has been well represented by Peter Jull.<sup>368</sup> In general, the legal and political recognition of indigenous Canadians’ rights to natural and cultural resources are more secure in contemporary Canada than in Australia because of Federal Constitutional protection for ‘existing aboriginal and treaty rights’ in the Federal Constitution.

Section 35(1) of the *Constitution Act 1982* has contributed to the legal protection of non-treaty rights and these have been given priority over competing commercial and recreational interests, but subject to conservation regulation. In the major case of *R. v. Sparrow*<sup>369</sup> it was established that fisheries regulations do not extinguish customary rights to fish unless a clear and plain intent to do so is manifest in the legislation. The court in *Sparrow* noted that government regulation which impinges on Aboriginal rights must be shown to be justified, and the court must determine whether the regulation is reasonable, whether it imposes undue hardship, and whether the limitation denies the holder of the right their preferred means of enforcing their right. The court held that when assessing government justifications for interfering with Aboriginal rights, court priorities should be 1. conservation, 2. subsistence needs, and 3. commercial and recreational fishers’ rights.

Since 1973, in Canada, there has existed a federal policy for the negotiation of comprehensive and specific claims between governments and indigenous Canadians. In Canada, specific claims deal with the

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<sup>361</sup> S. Kerins, Treaty of Waitangi Fisheries Commission, personal communication, 21 September 1995.

<sup>362</sup> Wickliffe, ‘The Co-Management of Living Resources and Maori Customary Fishing Rights.’

<sup>363</sup> Levy, ‘Fighting over the land...’, p.114.

<sup>364</sup> ‘The Fiscal Envelope: petty cash or sovereignty’, *Pacific News Bulletin*, Vol.10, No.4, April 1995, p.6.

<sup>365</sup> Levy, ‘Fighting over the land...’, p.115.

<sup>366</sup> *Kaitiakitanga* has been explained as ‘the exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself’: M. Mutu, ‘Maori Participation and Input into Resource Management and Conservation in Aotearoa/New Zealand’, in T. Buhrs (ed.), *Pacific Visions: Ka Tirohaka o te Moana-nui-a-kiwa: Paper presented at the Ecopolitics VIII Conference, 9 July 1994*, Lincoln University, 1994, pp.137-146.

<sup>367</sup> Cassidy, ‘Providing for Maori Rights’..., p.13.

<sup>368</sup> Jull, *A Sea Change...*

<sup>369</sup> [1990] 1 SCR 1075, 70 DLR (4th) 385.

implementation of government obligations to indigenous Canadians, such as unfulfilled land entitlements under the 11 major treaties which were entered into between 1871 and 1930, and issues over the surrender or sale of Reserve lands. Between 1970 and 1991 only 44 out of about 300 claims had been settled, but a 1991 revitalisation of the process has expedited claims settlements, with at least 40 being finalised since then.<sup>370</sup>

The comprehensive claims process enables the negotiation and recognition of aboriginal rights and interests in areas where those were not surrendered under treaty. The process has been described by the Canadian Minister of Indian Affairs and Northern Development as follows:

Comprehensive claims settlements are negotiated to clarify the rights of Aboriginal groups to lands and resources, in a manner that will facilitate their economic growth and contribute to the development of Aboriginal self-government. Settlements are intended to ensure that the interests of Aboriginal groups in resource management and environmental protection are recognised, and that claimants share in the benefits of development.

...[S]ettlement agreements define a wide range of rights and benefits to be exercised and enjoyed by claimant groups. These rights and benefits usually include full ownership of certain lands in the area covered by the settlement; guaranteed wildlife harvesting rights; guaranteed participation in land, water, wildlife and environmental management throughout the settlement area; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and parks in the settlement area. Settlement rights are constitutionally protected and cannot be altered without the concurrence of the claimant group.<sup>371</sup>

Thus co-management of natural and cultural resources has become a feature of the regional agreement process, under which native title rights tend to be negotiated and partly exchanged for statutory entitlements. In 1984 the principles under negotiation were described as including 'native advisory bodies on park planning and management; exclusive rights to harvest wildlife; rights to use present and traditional harvesting methods; rights to use camps and caches; predominant native employment in the parks; preferential business considerations; rights of first refusal of new business opportunities; and job training and the protection of cultural features'.<sup>372</sup> More recently the wildlife boards established under land claim settlements have been given a more authoritative role — being responsible for overseeing and coordinating wildlife and harvesting studies, establishing total allowable harvesting levels, ascertaining indigenous subsistence needs, determining the level of permitted commercial take (if any), issuing licences and distributing resources among the settlement area community.<sup>373</sup>

The Inuvialuit Final Agreement (IFA) is considered to be the first major settlement under the Comprehensive Claims Policy, and it was legislated in the *Western Arctic (Inuvialuit) Claims Settlement Act 1984*.<sup>374</sup> Environmental management is negotiated by a range committees which have been described as follows:

The IFA established a number of institutions to deal with the various components of environmental management, including wildlife harvesting and environmental impact controls ... These structures are all managed by approximately equal numbers of government and Inuvialuit representatives, except in a few specified cases. The Inuvialuit possess exclusive and preferential harvesting rights to game, except for certain migratory species. Six exclusively Inuvialuit Hunters and Trappers Committees provide representation to each of the communities in wildlife management. The committees encourage and promote Inuvialuit involvement in sustainable wildlife utilisation and are collectively represented on the

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<sup>370</sup> Government of Canada, 'Specific Claims', in *Canada and Aboriginal People: Building a Better Future Together*, typescript copy, n.d.

<sup>371</sup> Hon. T. Siddons, *Federal Policy for the Settlement of Native Claims*, Minister for Indian Affairs and Northern Development, Ottawa, 1993, p.7.

<sup>372</sup> T. Kovacs, 'Northern National Parks and Native People: The Canadian Experience', in U.S. National Park Service and the Colorado Historical Society, *International Perspectives on Cultural Parks: Proceedings of the First World Conference Mesa Verde National Park, Colorado, 1984*, pp.209-211 at p.210.

<sup>373</sup> L. MacLachlan, 'Co-management of Wildlife in Northern Aboriginal Comprehensive Land-claim Agreements', *Northern Perspectives*, Vol.22, No.2-3, Summer-Fall 1994, pp.21-27 at p.21.

<sup>374</sup> Richardson, Craig, Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia — Part 1', at p.332. See also: Richardson, Craig, and Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia — Part 2'.

Inuvialuit Game Council. The Council in turn advises the two Wildlife Management Advisory Councils which advise the appropriate Minister on wildlife conservation matters ...

The Inuvialuit Game Council, the Inuvialuit Regional Council and the IFA have established five co-management boards and committees; the Fisheries Joint Management Committee, the Wildlife Management Committee Advisory Council (Northwest Territories), the Wildlife Management Advisory Council (North Slope) and the Environmental Impact Screening Committee and Environmental Impact Review Board ...<sup>375</sup>

A government guide to the Inuvialuit Final Agreement describes its fishing rights aspect as follows:

The Western Arctic Claim Settlement will give the Inuvialuit priority in the harvest of marine mammals in the Settlement Region, including first access to all harvestable resources. This means that the Inuvialuit will have the right to harvest a subsistence quota of marine mammals, to be set jointly by them and the government. They will also be entitled to harvest any portion of any commercial or other quotas that they can expect to take within any given quota year, once such quotas have been set jointly according to sound conservation principles.

The Inuvialuit will have a preferential right to harvest fish for subsistence within the Settlement region; this includes trade, barter and sale to other Inuvialuit. Subject only to restrictions imposed by quotas each year, Inuvialuit will be issued non-transferable commercial licences to harvest a total weight of fish equal to the largest annual commercial harvest of that species taken by Inuvialuit from those waters over the preceding three years. Access to commercial harvests above that level will be granted on the same basis to Inuvialuit as to other applicants.<sup>376</sup>

A new national park on Banks Island was agreed under the settlement, with the Inuvialuit having some exclusive harvesting rights, and priority over recreational fishing. The Inuvialuit will screen archaeological research, be involved in the development of management regimes, and will have preferential access to employment, training and business licences in the park.<sup>377</sup> The settlement also involved financial compensation of \$152 million and 'a one-time payment of \$10 million to assist the Inuvialuit in social development'.<sup>378</sup>

Elsewhere in the Western Arctic, the World Wide Fund for Nature and the Igalirtuuq people of Clyde River have been developing a proposal for a bowhead whale sanctuary at Isabella Bay and Lancaster Sound — as the first Arctic marine sanctuary. The project aims to encourage business and tourism, be a demonstration project for regional conservation plans, and to restore the whale population to enable future hunting, amongst other aims.<sup>379</sup>

In the Yukon Final Agreement, signed in 1993, self-government arrangements and special management areas have been negotiated in the comprehensive claims settlement for that area.<sup>380</sup> Each of the four First Nations involved will exercise law-making powers over land-management, hunting, fishing, trapping and fishing, and business regulation. A new National park, special management area and a national wildlife area have also been created. The Vuntut National Park will be encompassed within the special management area, much of which will be owned by the Vuntut Gwitchin people, who will also retain harvesting rights.<sup>381</sup> Renewable Resource Councils are to be established with First Nation representation, and representation will also be granted on a

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<sup>375</sup> Richardson, Craig, Boer, 'Indigenous Peoples and Environmental Management...Part 1', at pp.332-333.

<sup>376</sup> Indian and Northern Affairs — Canada, *The Western Arctic Claim: A Guide to the Inuvialuit Final Agreement*, Minister of Indian Affairs and Northern Development, Ottawa, 1984, p.8.

<sup>377</sup> J. Morrison, *Protected Areas and Aboriginal Interests in Canada*, World Wildlife Fund Discussion Paper, World Wildlife Fund, Ontario, Canada, July, 1993, p.16.

<sup>378</sup> Government of Canada, 'Comprehensive Land Claims', in *Canada and Aboriginal People: Building a Better Future Together*, n.d., n.p.

<sup>379</sup> Community of Clyde River and World Wide Fund for Canada, *Igalirtuuq: A Conservation Proposal for Bowhead Whales at Isabella Bay, Baffin Island, NWT*, January, 1990, pp.18-19.

<sup>380</sup> Government of Canada, 'Council for Yukon Indians Sign Umbrella Final Agreement/Four Yukon First Nations Sign Land Claim and Self-government Agreements', *New Release Communique*, 1-9325.

<sup>381</sup> Government of Canada, 'Council for Yukon Indians Sign Umbrella Final Agreement...'

range of other land and resource management bodies.<sup>382</sup> The National Wildlife Area is to be a jointly managed waterfowl habitat. \$242.6 million is to be paid over 15 years in cash compensation to 14 First Nations.

The Nunavut Final Agreement extinguishes extensive tracts of native title (about 82 per cent) in exchange for negotiated benefits. Negotiated outcomes include the creation of new environmental bodies with customary owners having representation, as follows:

The Agreement allows the Inuit to establish an integrated environmental planning and management regime, in contrast to the current ad hoc resource development in the Arctic. It provides for five institutions: a Wildlife Management Board, an Impact Review Board, a Planning Commission, a Water Board and a Surface Rights Tribunal for Nunavut...The Final Agreement outlines the jurisdiction, make-up, powers and procedures that each of these institutions should follow...three new national parks in the region are to be co-managed.<sup>383</sup>

Under the Nunavut agreement the Wildlife Management Board is to be primarily responsible for managing wildlife in the Nunavut Settlement Area. The Board 'is to determine allowable levels for the harvesting of wild resources, to participate in research, to designate sanctuaries and wildlife conservation areas, and to provide advice for the promotion of wildlife education. Four of the eight members are to be appointed by designated Inuit organisations'. The Inuit also sought in the settlement the creation of new national parks at Auyuittuq, North Baffin and Ellesmere.<sup>384</sup>

Species-specific co-management regimes also operate in the North American Arctic — for the bowhead whale, beluga whale, Porcupine caribou herd, migratory geese, and the Pacific walrus. These agreements are negotiated by a range of government agencies and indigenous stakeholders.<sup>385</sup>

At Provincial level, governments and indigenous Canadians are also negotiating the settlement of their title and resource grievances. In British Columbia a Treaty Commission was agreed to in 1991 and announced in 1992 following consideration of the report of the tripartite British Columbia Claims Task force. The commission comprises five commissioners appointed by the Federal Government, the Provincial Government and the First Nations Summit (an umbrella body for First Nations and Tribal Councils).<sup>386</sup> Early developments included government agreement to Nisga'a proposals for the creation of new protected areas, under joint management arrangements, but a number of negotiations are being pursued simultaneously by the Commission.<sup>387</sup>

There are a range of other negotiated conservation/sustainable use agreements in Canada. The Osoyoos Indian Band is reported to be involved in the South Okanagan Conservation Strategy Wildlife and Habitat Project while the Pacific Estuary Conservation Program is administering the Cowichan/Chemainus Stewardship Project.<sup>388</sup> An 'Agreement on Joint Stewardship' was concluded between the Minister for the Environment, Land and Parks for British Columbia, and the Chief of the Cowichan Indian Band in 1992.<sup>389</sup> Its purposes (which are fulfilled subject to the laws of British Columbia) are to encourage cooperation and increased Cowichan participation in and for better environmental management; to provide a framework for continuing cooperation and the development of joint strategies; to communicate information about environmental concerns, and to provide a framework for the development of subsidiary agreements on a wide range of specific environmental issues, including environmental law enforcement and the development of Cowichan environmental bylaws; Cowichan involvement in environmental management and decision-making; and

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<sup>382</sup> Such as the Yukon Water Board, Development Assessment Board, Surface Rights Board, and the Territorial Fish and Wildlife Management Board.

<sup>383</sup> Richardson, Craig, Boer, 'Indigenous Peoples and Environmental Management... — Part 1', p.335.

<sup>384</sup> Morrison, *Protected Areas and Aboriginal Interests in Canada*, p.18.

<sup>385</sup> For an appraisal see: Osherenko, 'Sharing Power with Native Users'.

<sup>386</sup> R. Brant, 'British Columbia's Approach to Treaty Settlement', *Conference Paper presented at the Indigenous Land Use Agreements Conference, Darwin 24-29 September 1995*.

<sup>387</sup> Morrison, *Protected Areas and Aboriginal Interests in Canada*, pp.22-23.

<sup>388</sup> Cited in SSHARE/ERASSH, *The Aboriginal Peoples Resource Guide: Special Supplement* Spring, 1994, p.10. See also Jull, *A Sea Change...*

<sup>389</sup> Cowichan Indian Band and B.C. Environment, 'Agreement on Joint Stewardship', typescript copy, 1992.

fisheries, wildlife and water management, amongst others. In Ontario also, resource co-stewardship agreements have been negotiated in a number of situations: the Tememaugama Anishnabai-Ontario Agreement (Temegami); Ontario-Windigo-Shibigama Planning Agreement; Nishnawbe-Aski National Aboriginal Self-Government Interim Measures Agreement; and the Wabaseemoong-Ontario Co-management Agreement (Islington Band).

In Manitoba eighteen cooperative management arrangements were agreed between First Nations' Peoples and the Provincial Government between 1971 and 1992, but it has been argued that the resource-allocation priorities mandated in the *Sparrow* decision have yet to be fully realised.<sup>390</sup>

In 1992 Canada moved towards fisheries co-management with its Aboriginal Fisheries Strategy (AFS),<sup>391</sup> excerpts of which are discussed in Jull's RAC report.<sup>392</sup> The AFS affirms that priority access to fish for food, social and ceremonial purposes is a legal right for indigenous Canadian fishers. Commercial access is subject to negotiated agreement amongst relevant stakeholders. Economic development and employment rights are also created under the strategy. The 1992 strategy document states:

The AFS is expected to cost \$140 million [c. \$160 million] over a seven year period. Of this, \$73.5 million will be spent between 1992 and 1997 for fisheries based economic development, on-the-job training, and aboriginal participation in fisheries management practices. Seven million dollars will be spent for the pilot License Retirement Program [buying out non-indigenous fishing licenses to make room for more indigenous fishing], \$4 million for research, \$11.5 million for interim agreements, and \$20 million will be transferred ... to native groups to operate some Salmonid Enhancement Program facilities and small craft harbours.<sup>393</sup>

## United States

In the United States many treaties recognise indigenous Americans' customary rights to fish. A series of cases in the 1970s established that the claimant Indian tribes of the Columbia River and Puget Sound were collectively entitled to 50 per cent of the salmon and steelhead fish runs which passed through their customary fishing grounds;<sup>394</sup> and to regulate their fisheries according to tribal laws. Fisheries agencies are also required to negotiate and resolve allocation issues, subject to court adjudication. Inter-tribal fisheries management agencies have been formed to manage the resource allocation, such as the Columbia River Inter-Tribal Fish Commission, the Northwest Indian Fisheries Commission and the Chippewa-Ottawa Treaty Fishing Management Authority in Oregon, Washington and Michigan respectively. These bodies set seasons and harvest levels, and negotiate on management plans and annual sports fishing and commercial ocean fish harvest regulations.<sup>395</sup> The Columbia River and Northwest Indian Fisheries Commissions are also parties to the 1987 State of Washington Timber, Fish, Wildlife Agreement under which the Washington Department of Natural Resources negotiates with stakeholders about local and regional planning decisions 'regarding road construction, riparian area protection and timber harvesting operations'.<sup>396</sup>

Co-management agreements are also in place at State level.<sup>397</sup> On-reservation fishing and hunting rights are not subject to state regulation except for conservation purposes, but can be subject to tribal law. Off-

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<sup>390</sup> A. Haugh, 'Balancing Rights, Powers and Privileges: A Window on Co-Management Experience in Manitoba', *Northern Perspectives*, Vol.22, No.2-3, Summer-Fall 1994, pp.28-32.

<sup>391</sup> 'The Aboriginal Fisheries Strategy: Time for Straight Talk', April/May 1993, Distributed by the Department of Fisheries and Oceans (DFO), Canada.

<sup>392</sup> Jull, *A Sea Change...*, pp.42-44.

<sup>393</sup> Jull, *A Sea Change...*, p.43.

<sup>394</sup> Such as *United States v. Washington* 384 F. Supp. 312. See generally: R.J. Miller, 'Indian Hunting and Fishing Rights', *Environmental Law*, Vol.21, 1991, pp.1291-1300.

<sup>395</sup> C.F. Wilkinson, 'To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa', *Wisconsin Law Review*, 1991, pp.375-414, at pp.406-7.

<sup>396</sup> Wilkinson, 'To Feel the Summer in the Spring...', p.407.

<sup>397</sup> See for example the agreement between Minnesota and bands of Lake Superior Chippewa concerning tribal hunting and fishing regulations: Wilkinson, 'To Feel the Summer in the Spring', at p.406.

reservation hunting and fishing rights include access rights over private lands, exemption from license fees; exemption from fishing gear limitations and catch limits, except where necessary for conservation purposes.

The US Fish and Wildlife Service is the principal Federal agency in the United States with responsibility for conserving, protecting, and enhancing fish and wildlife and their habitats. According to the Service, it:

manages 504 national wildlife refuges covering more than 92 million acres and 74 national fish hatcheries. The agency also enforces Federal wildlife laws, conserves and restores wildlife habitat such as wetlands, administers the *Endangered Species Act 1973* and oversees the Federal Aid program that manages Federal excise taxes on angling and hunting equipment to support state fish and wildlife agencies.<sup>398</sup>

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<sup>398</sup> Anon, 'USA: Administration's Proposed Budget Continues Strong Commitment to Wildlife Conservation Programs', Business Wire, Atlanta, February 7, 1995, reproduced in *Environment News*, 9 February 1995, Vol.3, Article Ref: 000594596745.