

Office of the Minister for the Environment

Chair

Cabinet

Freshwater reform: Next steps and discussions at Waitangi 2015

Proposal

1. This paper seeks Cabinet agreement to the Government's position on addressing iwi/hapū rights and interests in the context of freshwater reform. It also seeks Cabinet approval of a workplan to direct the development of options to address iwi/hapū rights and interests through 2015.

Executive summary

2. The Government has made significant progress to improve freshwater management and address iwi/hapū rights and interests over the past six years.
3. The Minister for Primary Industries and I intend to progress the next stage of freshwater reform through 2015. This next stage is aimed at maximising the value from our freshwater resources as New Zealand transitions to a limit based approach, while addressing iwi/hapū rights and interests. Efficient allocation and use of fresh water is a key driver in making New Zealand a more productive and competitive economy.
4. The Government's position is that no-one owns fresh water, no generic share of freshwater resources will be provided to iwi, and there will be no national settlement of iwi/hapū claims to freshwater resources.
5. I envisage that further options to address iwi/hapū rights and interests will provide for national-level tools which can then be applied locally in a catchment-based engagement process with the relevant iwi.
6. Ahead of commencing the development of options for the next stage of reform, Ministers have undertaken to begin a substantive conversation with Iwi Chairs at Waitangi on 5 February 2015 on iwi/hapū rights and interests, particularly in respect of freshwater allocation and use.
7. The conversation is intended to set the scene for development of options to further address iwi/hapū rights and interests, and should outline the next steps in the freshwater reform programme.
8. I seek Cabinet agreement to a workplan to guide the collaborative work of the Crown and the Freshwater Iwi Leaders Group¹ (ILG) and their Iwi Advisors Group (IAG) through the next stage of reform. This workplan will be presented to Iwi Chairs at our upcoming meeting at Waitangi.

¹ This is a core group of iwi mandated by the Iwi Chairs Forum to engage with the Crown on all aspects of freshwater reform.

9. Following the Waitangi meeting, the Minister of Primary Industries and I will progress the development of policy options, both to enhance management within limits and to address iwi/hapū rights and interests. As these areas of reform are interdependent, we will develop options in parallel, and in consultation with wider stakeholders.
10. I intend to report back to the Cabinet Economic Growth and Infrastructure Committee:
 - by the end of June 2015 on the prioritisation of workstreams for options development in respect of addressing iwi/hapū rights and interests in fresh water; and
 - by the end of 2015, jointly with the Minister for Primary Industries, to seek agreement to consult on proposals in a discussion document.
11. I will raise with the Cabinet Strategy Committee (or other Committee as appropriate) any issues that arise through the options development process, as required.

Background

Previous Cabinet consideration

12. In 2013, Cabinet agreed in principle to the development of a document to update the public on freshwater reform [CAB Min (13) 10/15 refers]. The document, *Delivering Freshwater Reform*, was published in July 2014 and indicated that the Government's objective for the next stage of reform is to explore how we can manage within water quality and quantity limits by considering:
 - ways to get greater economic benefit, without degrading water quality;
 - how to allocate water fairly, efficiently and sustainably; and
 - how permits to take and discharge to water are allocated and transferred.
13. On 3 November 2014, the Cabinet Strategy Committee noted that, ahead of the next stage of water reforms, there is a need to facilitate a useful and informed discussion with iwi on freshwater, particularly at Waitangi in February 2015 (STR Min (14) 7/1 refers).
14. The Committee also noted that iwi leaders have expectations related to iwi rights and interests in water – particularly around allocation. In this respect, the Committee noted the Government's position that:
 - no-one owns fresh water [including the Crown];
 - there is no generic share for iwi [or hapū, of freshwater resources]; and
 - there is no national settlement [of iwi/hapū claims].
15. In terms of further reforms, the Cabinet Strategy Committee noted:
 - that the way in which iwi aspirations relating to water allocation could be represented is likely to vary from iwi to iwi;
 - that there is no reasonable prospect of a single, nationwide mechanism for water allocation being developed, as the composition and nature of

particular catchments (including existing water use rights and interests) differs across the country;

- that engagement processes on water management issues need to be considered on a catchment-by-catchment basis;
- that Treaty settlement and other ongoing engagement processes are appropriate mechanisms to address iwi claims to preferential rights and interests in water; and
- the importance of ongoing engagement, and in ensuring iwi are appropriately involved in freshwater management processes, on an iwi-by-iwi and catchment-by-catchment basis.

Addressing iwi/hapū rights and interests to date

16. Two key mechanisms for the Crown to address iwi/hapū rights and interests in fresh water are:
 - Treaty settlements process – provides redress for historical grievances on an iwi-by-iwi basis but explicitly excludes dealing with iwi claims of proprietorship of fresh water;² and
 - Freshwater reform process – establishes the regulatory framework under the Resource Management Act to enable recognition of contemporary iwi/hapū rights and interests in fresh water (typically ‘general’ rights and interests, which may need to be given locally-specific expression, e.g. protection of customary activities, right to access water).
17. Another avenue open to iwi/hapū (or anyone) to seek recognition of their rights and interests is to bring specific legal claims in the courts. Neither of the two mechanisms above precludes this ongoing possibility.
18. The Crown has publicly acknowledged that iwi/hapū have rights and interests in fresh water. The Crown has committed to considering how to integrate iwi/hapū rights and interests into a contemporary system for freshwater management.³ Ensuring that all reforms to the freshwater management regime are consistent with the Treaty is a key objective of the Government.
19. In developing a contemporary system for freshwater management, it is incumbent on the Crown to take account of all interests and consider how any rights and interests of iwi/hapū that have not been addressed can be integrated into a system of often overlapping and competing interests.
20. In essence, the Crown must undertake a balancing exercise in which the range of rights and interests are weighed in order to develop a framework that best meets the needs of all stakeholders. That requires the Crown to undertake a process of careful, informed, and deliberate reform, which necessarily will take time.

² Where the beds of lakes have been returned to iwi, the settlement has also stipulated that this does not confer rights or obligations in relation to the lake waters (e.g. s 171 of the Ngai Tahu Claims Settlement Act 1998 in relation to Te Waihora, and s 25 of the Te Arawa Lakes Claims Settlement Act 2006 in relation to Te Arawa Lakes).

³ Wai 2358, #3.1.234 – Memorandum of the Crown, submission to the Waitangi Tribunal, 9 September 2014.

21. This Government commenced a comprehensive reform of the freshwater management system in 2009. The reforms proposed and embedded to date address a range of iwi/hapū rights and interests in fresh water. The policy development process has been informed by Ministers' engagement with the ILG, and has resulted in initiatives to:
- improve the participation of iwi/hapū in freshwater planning processes particularly through proposed amendments to the Resource Management Act 1991;
 - provide for better inclusion of tāngata whenua values in freshwater decision-making through the introduction in 2011 of a National Policy Statement for Freshwater Management (NPS-FM) and amendments in 2014, including recognition of Te Mana o te Wai as a guiding principle;
 - establish a limits-based freshwater management regime, with improved protections for freshwater quality, also through the NPS-FM; and
 - provide for restoration of some water bodies through the creation of clean-up funds.⁴

Crown-iwi engagement on the next stage of reform

22. In September 2014, the Crown provided a progress report on freshwater reform to the Waitangi Tribunal in respect of its inquiry into the National Freshwater and Geothermal Resources Claim.⁵ The report observed it is by no means certain that all aspects of claimed rights and interests can be recognised in the context of balancing a range of other interests.
23. However, in the report, the Crown also committed to work collaboratively with the ILG to develop possible options for recognising iwi/hapū rights and interests beyond measures included in reforms to date, and indicated its hope to engage in wider public consultation on those proposals, including with iwi, during 2015.
24. Ministers agreed to begin a substantive conversation with Iwi Chairs at their meeting at Waitangi on 5 February 2015 on the next steps for water reform, particularly relating to freshwater allocation and use. This conversation is intended to set the scene for development of options to further address iwi/hapū rights and interests.
25. Officials and the ILG and IAG have worked throughout 2014 to build an information base to ensure that Ministers and the ILG are prepared to begin a robust, well-informed discussion on these issues.
- Officials gathered data on the nature of New Zealand's freshwater resource, its availability and where it is under pressure, how it is being used, where there may be opportunities for improvement, and comparisons of freshwater management in other jurisdictions.

⁴ Successive governments have contributed funding to improve water quality. This includes the Te Arawa Lakes and Lake Taupō restoration funds (\$107.7m), the Fresh Start for Fresh Water Clean-up Fund (\$15m annually since 2011) and the Te Mana o te Wai Fund to support community-led restoration projects (\$5m over 2014-2016).

⁵ Wai 2358, #3.1.234.

- The ILG undertook to develop a fulsome articulation of iwi/hapū rights and interests in fresh water. Through October and November 2014, the IAG and ILG held a series of over 20 engagement hui around New Zealand to collect iwi/hapū views on their rights and interests in fresh water.

Comment

Next stage of freshwater reform

26. Throughout 2015, the Minister for Primary Industries and I intend to progress reforms to enhance management within freshwater quantity and quality limits. In particular, we will develop policy options to:
 - assist regional councils to phase out the over-allocation of water takes or contaminants in catchments where this is a problem;
 - support more efficient use of freshwater resources to create opportunities for increased use and growth;
 - enable freshwater resources to be allocated in ways that encourage their highest value use and for new users to gain access; and
 - enhance the ability of regional councils and resource users to manage within quantity and quality limits.
27. I, working with the Deputy Prime Minister, also intend to progress the Government's commitment to appropriately provide for iwi/hapū rights and interests in the context of freshwater allocation and use.
28. My preliminary view is that the most effective approach will be to develop tools at a national level that can then be applied locally. These tools may include criteria for establishing the need to provide preferential access for iwi in catchment-based processes, and requirements or guidelines for regional councils when choosing or implementing allocation approaches or reviews of existing allocations.
29. In the next section I set out a workplan for the Crown's engagement with the ILG and IAG to develop options to address iwi/hapū rights and interests in the next stage of reform.
30. The reforms to enhance managing within limits and to address iwi/hapū rights and interests are interdependent, and both will consider allocation questions. The options therefore need to be developed in parallel.
31. During 2015, we will be involving stakeholders in policy development, as this will be necessary to test options and ensure buy-in to the direction of reforms. Ministers' engagement with the ILG and IAG will progress alongside this process, and will cover the breadth of freshwater reform options.

Workplan for development of options to address iwi/hapū rights and interests

32. Iwi Chairs are expecting a substantive discussion with Ministers at Waitangi on 5 February 2015. Ministers' remarks should indicate the Government's direction of travel for options to address iwi/hapū interests in freshwater allocation and use.

33. Wider stakeholders, including regional councils and sector groups, also will be expecting to hear from the Government about its plans for further reform, following publication of *Delivering Freshwater Reform* in July 2014.
34. I consider that the Government's position on iwi/hapū rights and interests, as discussed by the Cabinet Strategy Committee on 3 November 2014, forms parameters for the development of options to address iwi/hapū rights and interests through the next stage of freshwater reform.
35. Ministers' public commitment to a workplan at the Waitangi meeting with Iwi Chairs will enable us to discuss in tangible terms the next steps for freshwater reform. At the same time, it will enable Ministers to highlight the Government's and ILG's ongoing commitment to working together on these issues.
36. I seek Cabinet agreement to the workplan attached as Appendix 1, which has been endorsed by the ILG. Following Cabinet agreement or pending Cabinet approval, the ILG will present it to Iwi Chairs on 4 February for their endorsement. Based on my discussions with the ILG, I expect the workplan to be well-received by the Iwi Chairs.
37. The workplan sets out key dates and milestones for the development of options to address iwi/hapū rights and interests. Its current framing provides for Cabinet decisions:
 - before the end of June 2015 – to agree to the prioritisation of workstreams for options development in respect of addressing iwi/hapū rights and interests in fresh water; and
 - before the end of 2015 – to agree to consult on proposals for further freshwater reform in a discussion document, in line with the Crown's September 2014 report to the Waitangi Tribunal.
38. The release of a discussion document would support the Crown to consult with iwi/hapū on options to address their freshwater rights and interests, in line with its Treaty obligations.
39. The workplan also allows for work on the broader options for improving management within limits and those for addressing iwi/hapū rights and interests to be integrated. This is essential due to the interdependent nature of the issues.
40. The key areas of work within the workplan are as follows:
 - the ILG completing further engagement with iwi/hapū focusing on possible mechanisms for recognising rights and interests;
 - exchange of materials gathered by the Crown and the ILG in the course of the recent information-gathering efforts;
 - analysis on what iwi/hapū rights and interests are recognised within the current resource management framework and Treaty settlements, and what the potential gaps are, including:
 - The underlying bases for iwi/hapū rights and interests in fresh water, and an evaluation of how effectively those rights and interests currently are addressed.

- The outcomes that iwi/hapū exercising those rights and interests would achieve (e.g. development of land returned under settlements and underutilised Māori land, water being available for cultural and spiritual purposes).
 - The possible mechanisms for supporting the achievement of those outcomes, and the value to iwi/hapū and the wider community in doing so.
 - identification of priority workstreams for options development; and,
 - options development and analysis.
41. The workplan is high-level and may require amendment as discussions progress through the coming year. I therefore seek delegated authority to make amendments to the workplan with the agreement of the Deputy Prime Minister.

Future reports back to Cabinet

42. Under the workplan as it is currently framed, the Minister for Primary Industries and I intend to report back to Cabinet by the end of 2015 to seek agreement to consult publicly on proposals for further freshwater reform. In the interim, I will report back to the Cabinet Economic Growth and Infrastructure Committee by June 2015 on progress in developing options to address iwi rights and interests.

Consultation

43. The following agencies have been consulted and their views are reflected: Ministry for Primary Industries, Te Puni Kōkiri, the Treasury, and the Office of Treaty Settlements. The Department of Prime Minister and Cabinet has been informed of the proposals.

Financial implications

44. This paper has no financial implications.

Human rights

45. No inconsistencies have been identified between the proposals in this paper and the Human Rights Act 1993.

Legislative implications

46. This paper has no legislative implications.

Regulatory impact analysis

47. Regulatory impact analysis requirements do not apply to the proposals in this paper.

Publicity

48. Ministers' discussions with Iwi Chairs are open to the members of the Iwi Chairs Forum and are often covered by media. I intend to prepare media material on

the next stage of freshwater reform and the Government's commitment to appropriately recognise iwi/hapū rights and interests.

Recommendations

49. The Minister for the Environment recommends that Cabinet:

1. note that the Government indicated in the July 2014 publication *Delivering Freshwater Reform* that its objective for the next stage of reform is to consider how to manage within water quality and quantity limits to achieve greater economic benefit
2. note that policy development on the next stage of water reform will be progressed during 2015, including developing options to:
 - 2.1. assist regional councils to phase out the over-allocation of water takes or contaminants in catchments where this is a problem
 - 2.2. support more efficient use of freshwater resources to create opportunities for increased use and growth
 - 2.3. enable freshwater resources to be allocated in ways that encourage their highest value use and for new users to gain access
 - 2.4. enhance the ability of regional councils and resource users to manage within quantity and quality limits
 - 2.5. appropriately provide for iwi/hapū rights and interests
3. note that options for the next stage of reform as noted in 2 above will be developed in parallel as they are interdependent
4. note that Ministers have committed to begin a substantive conversation with Iwi Chairs at Waitangi on 5 February 2015 on iwi/hapū rights and interests, particularly in respect of freshwater allocation and use, to inform the development of further reform options
5. agree the Government's position that:
 - 5.1. no-one owns fresh water, including the Crown
 - 5.2. there will be no generic share of freshwater resources provided for iwi
 - 5.3. there will be no national settlement of iwi/hapū claims to freshwater resources
 - 5.4. freshwater resources need to be managed locally on a catchment-by-catchment basis within the national freshwater management framework
 - 5.5. the next stage of freshwater reform will include national-level tools to provide for iwi/hapū rights and interests
6. agree that the Government's position agreed in 5 above will provide the parameters for the development of options to address iwi/hapū rights and interests
7. agree the workplan for addressing iwi/hapū rights and interests through the next stage of freshwater reform (attached as Appendix 1)

8. note that the Freshwater Iwi Leaders Group intends to present the workplan to Iwi Chairs for endorsement at their meeting at Waitangi on 4 February 2015
9. delegate authority to the Minister for the Environment to make amendments to the workplan with the agreement of the Deputy Prime Minister
10. invite the Minister for the Environment to report back to the Cabinet Economic Growth and Infrastructure Committee by June 2015 on the prioritisation of workstreams for options development in respect of addressing iwi/hapū rights and interests in fresh water
11. invite the Minister for the Environment and the Minister for Primary Industries to report back to the Cabinet Economic Growth and Infrastructure Committee by the end of 2015 on proposals for reform to be in a discussion document for public consultation.

Hon Dr Nick Smith
Minister for the Environment

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