> *Maori have few genuine friends outside of Maoridom, especially among organisations with significant resource management responsibilities*

Act and subsequent Acts and regulations would be so important?

Given the passion with which all parties have approached this case, it has come as no surprise that Maori have sought leave to appeal the High Court decision to the Court of Appeal, the highest court in the land. At the time of writing, leave has not yet been granted, but it is practically a forgone conclusion that it will be. Fish & Game New Zealand would have sought likewise, had the High Court decision not been in its favour.

The Court of Appeal will decide if the High Court decision is legally correct. While the case may well be heard before the beginning of the fishing season (this year!), the Court of Appeal will invariably reserve its judgment. This time round Fish & Game New Zealand will be defending the decision of the lower court (the High Court) and it will be Maori that will be seeking to overturn it.

Kirk McRitchie and the Taranaki Fish & Game Council are, essentially, now only bystanders to the main game. While their names appear on all the major documents, the case is really about the authority of Parliament and the relevance of the Treaty to introduced species. It is a significant constitutional issue, and the Crown may well join the case, as it can with any case of significant public/constitutional importance.

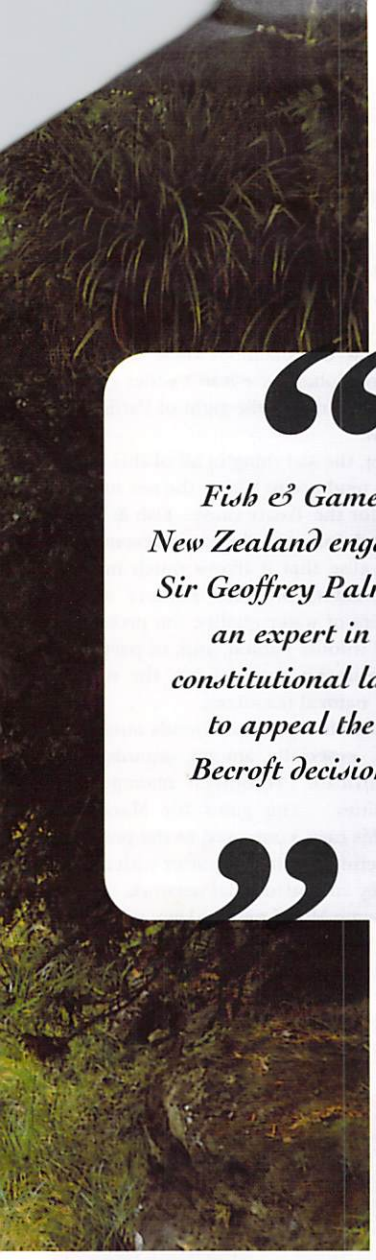
Fish & Game New Zealand must take this case through to a final end point. It is about our reason-for-being, and about a time-proven system of user-management that treats everyone equally before the law. Curiously, it is a system of management based upon a simple principle that Maori are seeking for themselves, and only beginning to achieve – resource management responsibility by the end users of a natural resource, based on the simple assumption that those who are directly affected by decisions have the greatest of incentives to make the right decisions.

For Wanganui Maori, the Wanganui trout case is about the mana of their tribe, but other Maori probably see it in a wider context – a direct challenge to the right of Parliament to make law.

However, the sad thing in all of this is that such issues tend not to add to the net support by pakeha for the Treaty cause. Fish & Game New Zealand, for example, has in recent years come to realise that it shares much in common with Maori on such matters as the improvement of water quality, the protection of fish and wildlife habitat, and, of particular importance in this day and age, the sustainable use of natural resources.

Maori have few genuine friends outside of Maoridom, especially among organisations with significant resource management responsibilities. The gains for Maori are minor in this case, compared to the potential loss of a useful external supporter with a large constituency and influential network.

While some Maori may be keen to win the Wanganui trout battle, the wise ones should be thinking about what a local victory would do to their national effort for greater overall responsibility and involvement in the management of selected natural resources.



> ***Fish & Game New Zealand engaged Sir Geoffrey Palmer, an expert in constitutional law, to appeal the Becroft decision***

research, the appeal was heard before the High Court in December last year.

Under new court rules the case had to be contained within 40 pages, but was supported by hundreds of pages of supporting case law and historical record. So far it has cost Fish & Game New Zealand more than $100,000.

It was all over in a day, with some of those involved wondering how so much work could be distilled down into a three hour presentation. At least the "rules of engagement" were the same for both sides. Being the appellant meant that Fish & Game New Zealand was able to present closing submissions at the end of the day that critically examined the case put by Maori.

Fish & Game New Zealand's case had three legs to it, and was presented in the form of legal scenarios, with respective supporting argument for the Court to consider, ranging from our most favoured to our least favoured. These were as follows:

"That no Maori fishing rights defence exists for trout, based on the argument that:

1) *The Conservation Act management regime (Article I) occupies the field for sports fish precluding a Treaty right (Article II) or aboriginal title right. In any event, the scope of Maori fishing rights does not extend to the species of trout. In any event, Section 10 of the Treaty of Waitangi (Fisheries Claims) Act 1992 precludes a Maori fishing rights defence.*
2) *If a Maori fishing rights defence applies to trout, it does not exempt Maori from the current licensing regime since the two can co-exist.*
3) *Even if the Maori fishing rights defence exempts Maori from the requirement of a trout licence, the content of the defence was defined too broadly by Judge Becroft and contains insufficient limitations to conserve the trout resource and uphold the policy of the Conservation Act."*

The two High Court judges took five months to consider the case and deliver their judgment. While the simple outcome is widely known, it is worth noting why they found in favour of Fish & Game New Zealand's first (most preferred) legal scenario.

To help readers further understand this case, it is also worth noting the actual questions that Judge Becroft agreed to have put before the High Court:

"1) Are the "Maori fishing rights", referred to in a 26ZH of the Conservation Act 1987, considered in the light of s4 of that Act, "aboriginal" (customary) rights or "treaty" rights, or both, and is there any distinction?
2) Are the "Maori fishing rights" as described and protected in the Conservation Act, rights in respect of particular rivers or parts of rivers or are they species restricted?
3) Do the "Maori fishing rights", described and protected in the Conservation Act, include the right to fish in a river for non-indigenous trout, as qualified in my judgment:
a) without a licence; and/or
b) in a method that is inconsistent with the scheme of the Taranaki District Anglers' Notice although no offence was committed thereby and even though no evidence was led to establish that the method actually used detrimentally affected the conservation of the trout resource?
4) Assuming "Maori fishing rights" other wise include the right to fish for trout in a river as set out in my judgment, have those rights been abrogated or restricted by relevant legislation, particularly the Conservation Act 1987, and/or by the consent of Maori?
5) Was the decision correct?"

To determine the questions of law the Judges traced the development of legislative provisions relating to the trout introduced into New Zealand freshwater.

Their analysis of this legislative history began with the Salmon and Trout Act 1867, which was passed in contemplation of the introduction of trout from overseas. At that time its provisions were seen as "...necessary ...for the preservation and propagation of salmon and trout on their arrival in this colony". The key point is that this Act was passed by Parliament before trout ever got here. Their analysis also established the role of the Acclimatisation Societies (now Fish & Game Councils) as the primary parties with statutory responsibility assigned by Parliament for the protection, welfare and use of trout.

So what won the day in the High Court? The two Judges put it this way:

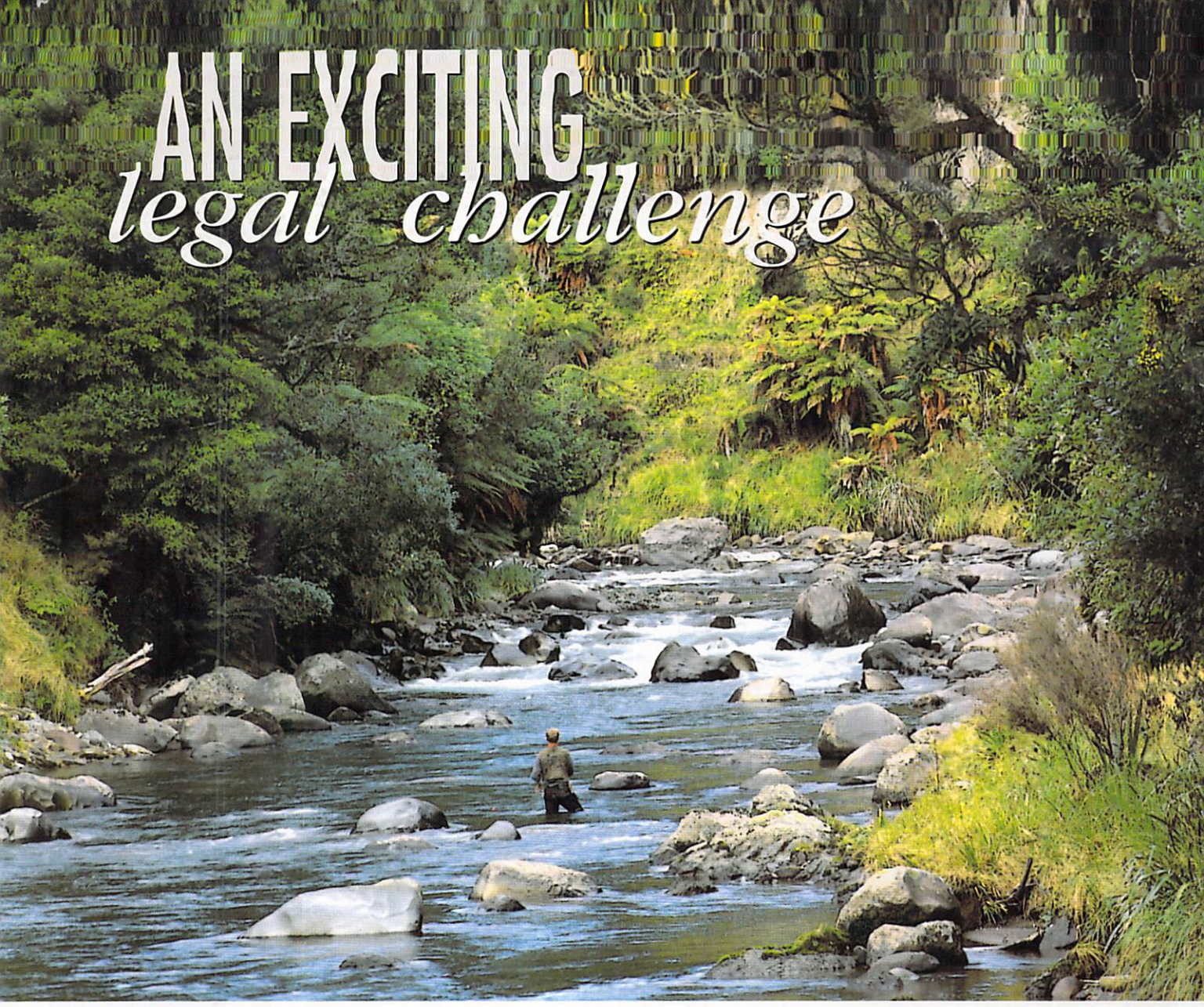
"In our view the appeal should be allowed on the basis that the acquisition of any Maori fishing right in respect of trout is precluded by the legislation existing at the time of introduction of the species and since."

And in response to the five questions (referred to above) that they had been asked to decide, simply recorded:

"The formal answers to the questions stated for the opinion of the Court are:
1) no answer necessary in this case;
2) no answer necessary;
3) no;
4) no answer necessary;
5) no."

In effect, the Judges found that Parliament had legitimately exercised its sovereign right, under Article I of the Treaty of Waitangi, to make laws for application to all the people of New Zealand; but in a manner that deliberately sought to recognise and protect Maori rights to their fisheries under Article II of the Treaty – the net effect being that trout were never considered to be a part of the Article II right. Who would have thought a 130-year-old

AN EXCITING *legal challenge*



Fish & Game NZ
No 7 1998

BY FISH & GAME NEW ZEALAND DIRECTOR BRYCE JOHNSON

THERE WOULD HARDLY BE AN ADULT angler in New Zealand who hasn't heard about the Wanganui trout case. It involved a young Maori chap, Kirk McRitchie, who was caught fishing without a licence, claiming he could fish for trout by virtue of right arising from Article II of the Treaty of Waitangi, as recognised in the Conservation Act. That Article talks about Maori having "...full, exclusive and undisturbed possession of their...fisheries". The defence before Judge Andrew Becroft was simply that trout were a part of the "fishery" referred to in the Treaty. The fact that they were introduced to New Zealand after the Treaty was signed in 1840, was considered irrelevant.

Perhaps needless to say, but Fish & Game New Zealand, freshwater anglers, a number of senior and not so senior politicians, and a fair few of the wider public, got pretty excited by Judge Becroft's decision in favour of Mr McRitchie. The Judge summarised his decision as follows:

"Lest I be misunderstood, the effect of my decision is to allow Maori from hapu or iwi having traditional territorial authority over a river fishery, to fish for trout without a licence, provided:

a) they do so according to the terms and conditions of local kawa/protocol and are able to prove they are properly authorised to do so;

b) the fishing is for personal/family consumption or for hui/tangi and the like;

c) and that the fishing does not impinge upon the conservation and sustainability of the trout resource."

However, the Judge also recorded that his judgment was at

"...what might be called the 'liberal end' of the spectrum",

that the right he was granting to Maori with his judgment would

"...not apply to Europeans or other New Zealanders",

and that

"...to that extent there may be an injustice".

It was almost as if the Judge was saying the case was too controversial to be finally resolved in a District Court where local community tensions were running high, and that he was pleading for the case to be appealed to a higher court.

Judge Becroft also stated that his decision was not a

"...charter for Maori to fish for trout without a licence anywhere in New Zealand",

and that it did not

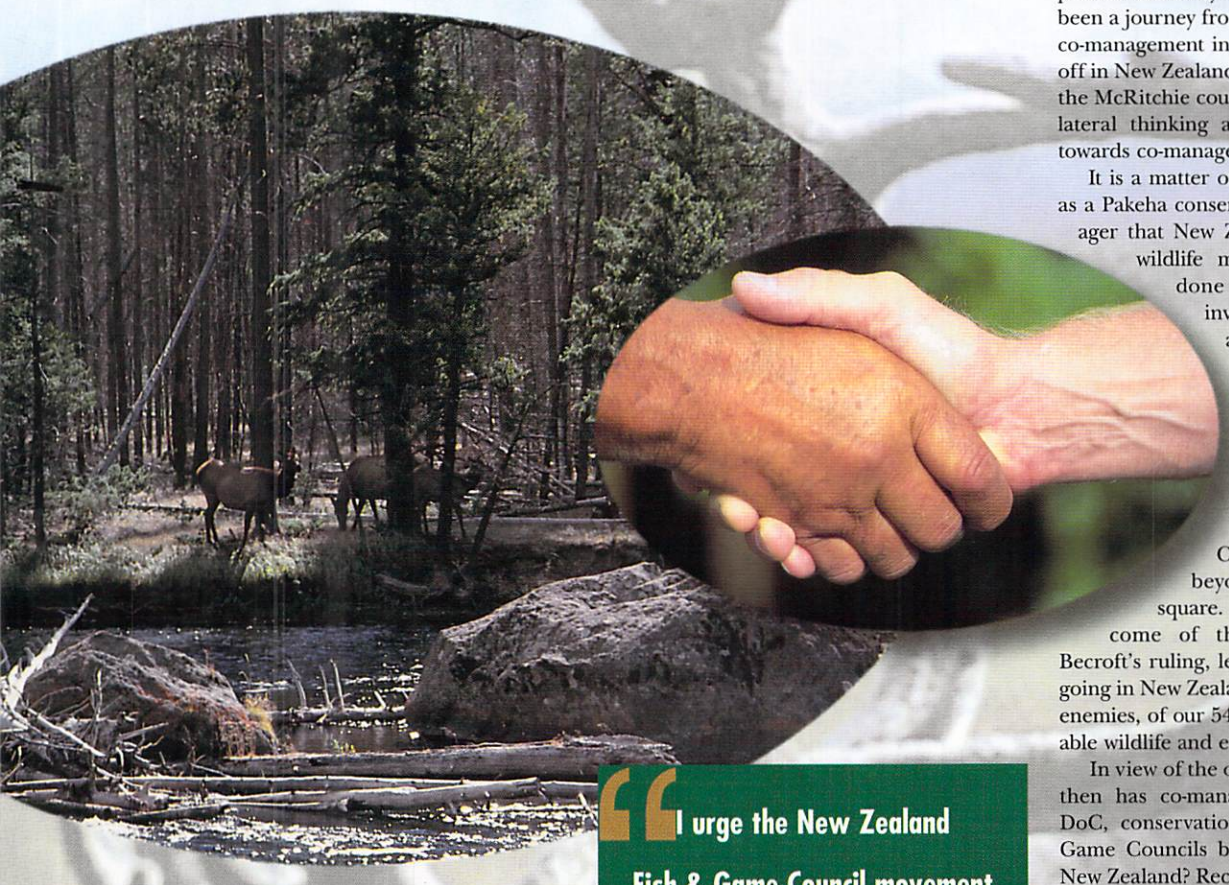
"...declare 'open season' on trout".

In practice almost everyone else knew it was, and it did!

An appeal was inevitable. The decision, if left unchallenged, would lead to one sector of New Zealand society being able to utilise, by any means and without payment, a fish resource provided and paid for by another sector of society that was still required to comply with harvest restrictions. Maori claims that the case was also about the control of natural water, and the ownership of rivers, sharpened public interest and opposition.

Fish & Game New Zealand engaged Sir Geoffrey Palmer, an expert in constitutional law, to appeal the Becroft decision. Following a huge amount of legal and historical

Mutual Mistrust to Co-management



FOR EXAMPLE, A 1974 COURT RULING recognised the rights of the "Treaty Tribes" to manage the salmon fishery in Washington (USA) and instructed the Department of Fisheries to co-operate and share information with one another. There was at first slow progress on co-operation and conflict about the basis of decision making to regulate the harvest. A new State Governor eventually sacked five officials in the Fisheries Department and there was then rapid progress towards co-management. The tribe's traditional environmental knowledge ("Matauranga" to Maori) led the 20 Indian tribes to insist that the fishery should be regulated on a watershed by watershed basis rather than the state-wide approach hitherto used by the state agency. A co-management agreement was adopted in court in 1985 that cements the basis for cooperation between the indigenous people and Fisheries Department on management and advocacy concerning habitat protection, hatchery production, harvest limits, sharing of population and stock assessment data and pollution control. Overall the number of salmon have increased since the co-management regime was instigated, apparently by three-fold for one species.

Co-management of deer harvests in the North West of the USA also gives cause for optimism. The Yakama, Nez Perce, Walla Walla, Umatilla and Cayuse peoples retained a treaty right (1855) to hunt deer on open and unclaimed areas in return for living in a reservation. Conflicts have often arisen when Indians hunted in closed areas or during closed seasons declared by State wildlife agencies. Some avoided prosecution even though the Treaty right was granted to the tribe as a whole rather than to individuals. Things started to improve when moves towards co-management meant that the Tribal Councils adopted a "Wildlife Code" to regulate their peoples hunting and agreed to prosecute all people caught violating it. Importantly, they also allowed the state authorities to prosecute Indians who violated rules that occurred in both State and Tribal codes. Compliance problems have been reduced and conflicts relating to Indian rifle hunters disrupting bow-hunters have largely been resolved. Tribal and State biologists share data and trend assessments. The most important form of co-operation and mutualism has been in the area of habitat protection. Formerly, the state wildlife agencies were reluctant to battle another state forestry agency whose management threatened wildlife habitats (politicians don't like it much when their servants fight one another in public about state policy!). The Tribal States had no such reluctance and they had the state forestry agency in court pronto to force them to mend their environmental ways. The involvement of the First Nations in co-management marked a turning point in advocacy for habitat protection. It has been a journey from mutual mistrust to active co-management in 15 years. We can pull that off in New Zealand provided we think beyond the McRitchie court case and engage in some lateral thinking and innovative negotiation towards co-management.

> **"I urge the New Zealand Fish & Game Council movement to think beyond the Pakeha cultural square"**

It is a matter of sadness and shame to me as a Pakeha conservationist and wildlife manager that New Zealand's conservation and wildlife management agencies have done very little, very late to involve Maori more; to listen and learn from them; and to create real power sharing structures that draw iwi alongside as equal partners and allies for the environment and wildlife. I urge the New Zealand Fish & Game Council movement to think beyond the Pakeha cultural square. No matter what the outcome of the appeal of the Judge Becroft's ruling, let's get real co-management going in New Zealand. We can make allies, not enemies, of our 54 iwi in the fight for sustainable wildlife and environmental management.

In view of the overseas success stories, why then has co-management between iwi and DoC, conservation groups and the Fish & Game Councils been so slow to develop in New Zealand? Recent focus on the issues partly reflects growing assertion of rangatiratanga by Maori in several walks of New Zealand life. Iwi have consistently but quietly called Pakeha on their lack of honouring of the wildlife management rights guaranteed by the Treaty of Waitangi. More recently their reminders have been louder, and more varied, with legal teeth to drive the point home. Pakeha have a lot of listening to catch up on. This is not a new grievance, it's just that it is being talked about more openly. Partly the lack of co-management reflects institutional and personal inertia - it's hard for agencies and leaders to change power structures, to let new partners have a slice of the action. There are few concrete models of how co-management might work in the New Zealand context, so we have to set off somewhat in the dark to create a new way of managing wildlife. Once the first models have been trialled, it will be easier to establish co-management with other iwi because society will have a better understanding of how, when, and where the co-management might work. There is a lack of financial resources and Maori-oriented ecological research to establish co-management systems with iwi. Inevitably, then, there will be a delay before the capacity exists for some iwi to take on an active co-manager's role. Sadly, there is another fundamental reason for a lack of co-management in New Zealand.

Some (not all!) New Zealanders, including some leaders of the conservation movement, have expressed blatant environmental racism in their opposition to Maori being given a special role in wildlife management. Prejudice exists on both sides of the cultural divide

From Mutual Mistrust to Co-management

Maori doing it. Poaching is an outrage to the common good, and the enemy of legitimate customary use of wildlife by Maori and non-Maori alike. One's race does not exempt anyone from ecological realities and the need for good wildlife management.

Effective and cheaper law enforcement is a common outcome of co-management. In Indonesia's remote islands, co-management has empowered locals to watch out for and apprehend interlopers that use dynamite fishing techniques for a quick grab that destroys the reef. The upcoming co-management arrangements for the Crown

> **"A court battle seems an unlikely way of making friends, but the experience overseas is often that it takes the courts to create a shotgun marriage of co-managers"**

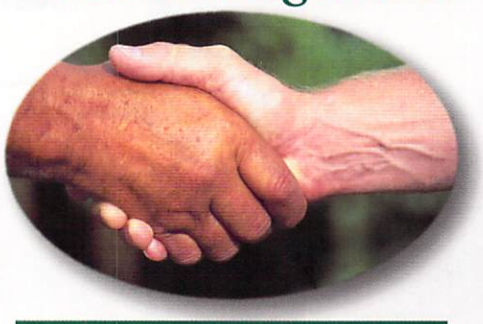
The kereru, a traditional food harvested by Maori, may be in decline in parts of NZ. Co-management with iwi could help enlist iwi in an active restoration effort through rat, stoat and possum control

Titi Islands is a local example. Rakiura Maori will manage and regulate titi (muttonbird) harvests in remote offshore islands. Only they could achieve this in a cost-effective and culturally congruent way.

New Zealand has 54 iwi, each with their own history, knowledge, stake and especial interest in the their local patch ("rohe"). Each also had an agreement with the Crown that they could retain their wildlife management rights. In a very concrete and immediate way the Treaty of Waitangi was about wildlife management – the protection of the Maori economy and cultural identity through guaranteeing its hunter gathering and food management ("mahinga kai") rights. Wouldn't you move first to protect the very essence of your economy when signing a contract with a whole lot of newcomers that were asking to stay? Many Fish & Game members are smarting at the thought of Maori having special wildlife management rights. I urge them to put themselves in Maori shoes. Imagine how it must feel for Maori to have lost control of the complete show: their wildlife, their land, their water, and their cultural identity as expressed through their particular hunting and fishing customs.

A court battle seems an unlikely way of making friends, but the experience overseas is often that it takes the courts to create a shotgun marriage of co-managers to force them to talk and work together. The USA and Canada have been working out their wildlife management conflicts between indigenous peoples and federal or state wildlife agencies both in and out of court for the past 20 years.

From Mutual Mistrust to Co-management

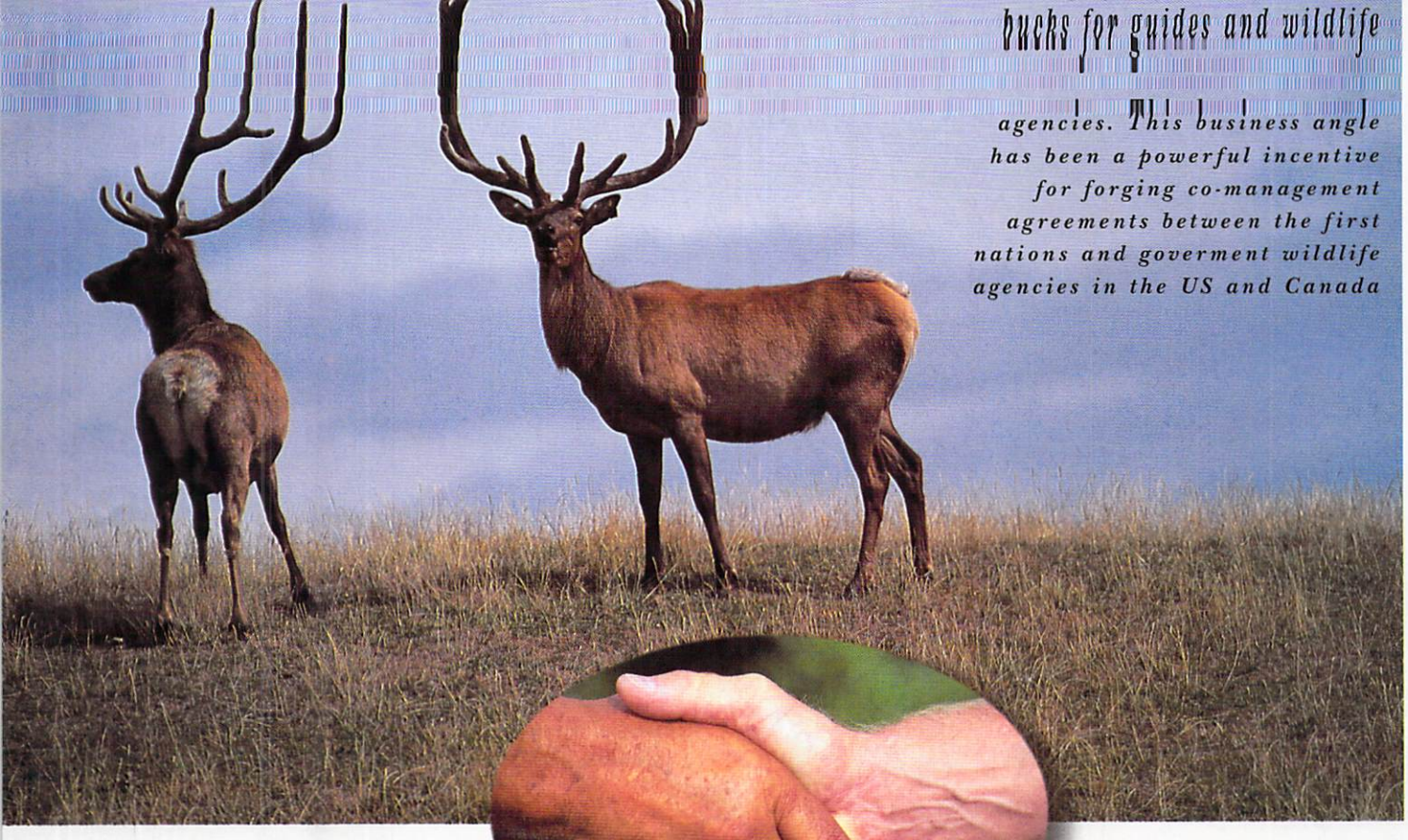


"We should expect conflict management but not complete conflict resolution, even once active co-management has been established"

SINCE SPEAKING OUT PUBLICLY FOR Maori control of legitimate sustainable harvest of native wildlife I have received a stream of abusive letters that reveal an ugly side of New Zealand society's attitude to Maori. Legitimate concerns for poor environmental management is not environmental racism – but generalising that Maori are poorer or better environmentalists than are Pakeha is racism in my book, especially when the ecological record is plain – both groups have been poor environmentalists in the past! Excluding one group of people from healing those past environmental impacts is discriminatory, especially when exclusion of Maori occurs despite a treaty promise of an equal partnership role in wildlife management. The Forest & Bird Protection Society's current policy on treaty issues states that they oppose transfer of title or management control of the conservation estate to Maori.

Establishing co-management is bound to create some new conflicts while it solves others. The overseas experience is instructive – we should expect conflict management but not complete conflict resolution, even once active co-management has been established. Some divergence in philosophies, priorities and methods will continue between the management partners. After all, each partner has a different culture, world view, and daily living reality. It is therefore very important that the co-management agreement sets up an explicit conflict management system to work through the differences as they arise.

The first step towards co-management has always been to recognise the local people and connection to their land and water. Maori express this as recognition of "mana whenua" status and their "rangatiratanga" (authority and responsibility) to manage their own environment. One seemingly small instance can illustrate the importance of sorting out the power issue first: Tom Te Wehi (Ngai Tahu) was taken to court for contravening fisheries regulations in his paua catch in 1986.



bucks for guides and wildlife

agencies. This business angle has been a powerful incentive for forging co-management agreements between the first nations and goverment wildlife agencies in the US and Canada

IN NEW ZEALAND'S CASE, THAT alienation has been growing for more than 150 years, but we lag well behind much of the rest of the world in establishing active co-management with our indigenous people.

The earliest and most powerful example of the benefits of co-management comes from Zimbabwe and their "Campfires" programme. Local communities were trusted to draw up their own management plans, regulate hunting and tourism, and to organise distribution of the benefits to the locals. Instead of locking up land, a change to conservation for future use of wildlife emerged, and the land area dedicated to wildlife management increased at an astonishing 7% per annum as people got in behind the change. Local communities clamped down on poachers (they knew who they were and had the social contacts to curb them), found innovative methods of habitat enhancement (e.g. provision of water for big game species), and gave the locals a stake in the benefits as well as responsibilities to make wildlife management succeed. Hunters and tourists gained a better wildlife experience.

Elimination of poaching has been a common outcome of co-management in other parts of the world, examples including illegal hunting of polar bears and even belugas, those remarkable small white whales in Alaska. In Taitokerau (Northland) there is reputed to be considerable poaching of kereru (New Zealand wood pigeon), and there is anecdotal evidence that the kereru numbers are declining. Recognition of the local iwi authority as wildlife managers, and their consequent responsibility for imposing a rahui (harvest ban) on kereru harvest is one potential way of booting the butts of those perpetrating the crime, if indeed they are mainly

Natural Allies

BY FISH & GAME NEW ZEALAND DIRECTOR BRYCE JOHNSON

FISH & GAME NEW ZEALAND IS IN THE business of conservation for sustainable use. While we, and our constituent anglers and hunters, obviously believe in the intrinsic value of having ducks in our wetlands and trout in our rivers, we also want to harvest those resources on a sustainable basis.

"Bottom up" conservation management is the foundation of the sports fish and gamebird management model in New Zealand. The people who use the fish and game resource are also responsible for its day to day management and welfare. "There are none so motivated as those who have to live by the consequences of their own decisions", is how Sir Geoffrey Palmer described Fish & Game Councils at the time of their establishment. How true.

Henrik Moller's case for the involvement of indigenous peoples in indigenous species management is really no different to angler and hunter involvement in fish and game management. In many respects what he proposes, and Maori perhaps seek, anglers and hunters already have. Perhaps we can help each other.

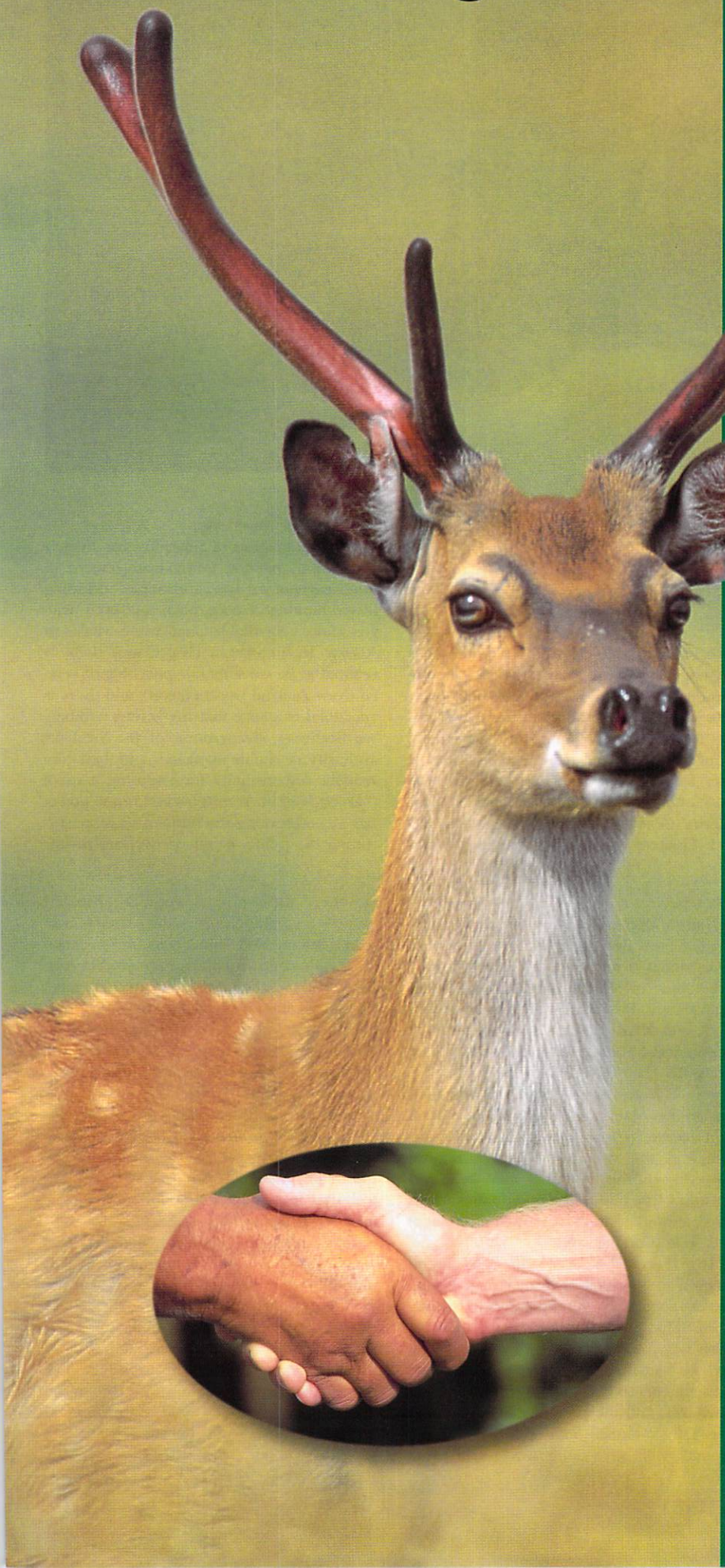
To this observation can be added the fact that Maori, and Fish & Game, have a deep interest in water quality, habitat protection, and the sustainable use of natural resources. On this basis they have to be natural allies. The question is how do we harness this commonality to best mutual advantage? Well, we're working on it.

The recent Ngai Tahu settlement, achieved in consultation with Fish & Game, includes some very useful pointers to the way ahead. The proposed new requirement of South Island Fish & Game Councils to consult with Ngai Tahu on matters relating to the management of the four species of native gamebirds, and the probable co-option of a Ngai Tahu nominee onto each South Island Council, will go a long way to bringing together different viewpoints directed towards a common goal – the maintenance, management, and enhancement of gamebirds. The contractual arrangement between Ngai Tahu (the new owners of Lake Ellesmere) and Fish & Game New Zealand – North Canterbury, will secure the continuation of recreational gamebird hunting on the lake and enhance its management for all wildlife. Everyone benefits.

And on the Becroft case, the issue is not about creating winners and losers. Both parties, and the Crown, know the law needs to be thoroughly clarified. But regardless of the technical legal outcome, Maori and Fish & Game will be seeking to identify areas of activity that are mutually beneficial. This could involve operational capability as well as mutually desirable conservation management outcomes.

Co-management imposes obligations and responsibilities on all participating parties. It is not a master/servant relationship. The mana of all participants must be recognised and respected. Fish & Game is not opposed to participating in that debate – we have a good story to tell. F&G

From Mutual Mistrust to Co-management



Did Judge Becroft's decision rattle your cage? If so, relax. Provided we work through the issues with common sense and respect for both the environment and culture, New Zealand wildlife management may just have gained 54 powerful allies. Overseas experience shows that justice and environmental issues are not opposites that need to go head to head, resulting in one winner and one loser. Worse yet, both can become losers if the justice issues are ignored. Sustainable management solutions need to resolve justice issues, or people will not co-operate fully to enhance environmental values. Recognition of New Zealand's 54 iwi and their Treaty of Waitangi grievances is the key first step to getting on with the job of wise management of our environment. Dr Henrik Moller, co-director of the University of Otago's postgraduate diploma in Wildlife Management and co-director of Ecosystems Consultants, a private group of ecologist researchers currently working with Rakiura Maori to assess the sustainability of muttonbird harvest, reports.

TIME AND AGAIN SINCE THE LATE 1970S, the environment has benefited when "co-management" has been invited by wildlife management agencies with local Indigenous Peoples' communities in overseas countries. The International Union for Conservation of Nature (IUCN) has learned that centralised, topdown imposition of conservation and wildlife laws won't work as well as local, smaller scale, bottom-up conservation management approaches. It makes common sense. Empower the locals by giving them real authority and responsibility, and you will get better outcomes for wildlife. So the IUCN is working hard in places like the USA, Canada, Greenland, India, Pakistan, Australia and several African states to draw Indigenous Peoples' authorities ("iwi" in our country) into wildlife management. The IUCN hopes to reverse the alienation that these people felt over the preceding decades after being frozen out from control of wildlife in their local area.