

7 March 2016

Secretariat
Local Government and Environmental Committee
Select Committee Office
Parliament Buildings
WELLINGTON 6011

By email: LocalGovernment.Environment@parliament.govt.nz

RE RESOURCE LEGISLATION AMENDMENT BILL

This submission is on the iwi provisions in the Resource Legislation Amendment Bill

Democracy Action was established in 2012 in Auckland by a group of citizens concerned about the erosion of democratic principles in the Auckland Council's governance of Auckland and the Hauraki Gulf. We now have members throughout New Zealand. Our website is <http://www.democracyaction.org.nz/>. I write this submission as secretary for the group.

This submission does not necessarily reflect all the views of any or all members of Democracy Action, but it does reflect the group's overall view. Some individual members have made separate submissions.

Democracy Action commissioned a legal opinion from law firm, Franks Ogilvie, on the iwi provisions in the Bill. This is enclosed as evidence. This submission draws on this opinion.

We also enclose:

- Advice provided by Franks Ogilvie to us in 2014 on Auckland Council's draft unitary plan (PAUP)
- The Taniwha Tax Briefing Paper on Auckland Council's New Mana Whenua Rules (Prepared by the New Zealand Taxpayers' Union, 2015)
- Letter from Auckland Council to Lee Short, Democracy Action, 23 October 2014

- Letter from Auckland Council to Jordan Williams, 25 August 2014
- Evidence by Dr Kenneth Palmer to the Auckland Unitary Plan Independent Hearings Panel (4 June 2015)
- Auckland Council, Auckland Plan Committee, Open minutes for meeting 12 February 2013
- Newspaper articles:
 - Marian Slade "Council removes fewer Mana Whenua sites than planned" in AucklandNOW (12 November 2015)
 - Chris Hutching "Up to 18,000 properties affected by taniwha tax" in National Business Review (15 April 2015)
 - Michael Dickison "'Monstrosity' for Gulf", in NZ Herald (2 October 2012)
 - Brian Rudman "Bid for new forum a power grab", in NZ Herald (22 October 2012)

We wish to present to the Committee. The contact person for this submission is the writer. Contact details are:

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Democracy Action opposes all provisions in the Bill which give iwi preferential treatment (referred to as “iwi provisions” in this submission). In particular, the following clauses should be removed:

- a) 13 (new section 32(4A)),
- b) 16 (new section 34(1A)),
- c) 38 (new Subpart 2 on IPAs) plus any other references to the IPAs,
- d) 125 (new section 95B),
- e) Schedule 1: new clauses 1A, 4A, 5A(8)(e), 74

GENERAL OBJECTION ON PRINCIPLE

1. The Bill goes far beyond the current requirements in the RMA. It represents a significant constitutional change that is contrary to the fundamental principles New Zealand citizens believe in. The Bill would enable natural and physical resources being controlled by, in part and in some cases wholly, by one group of citizens, based on race. That control may be partial, or de facto, but in practice it may at times amount to a veto power.
2. Under the iwi provisions, iwi representatives who exercise that power are not accountable to either the public, or to Councils.
3. In our democracy law making is for democratically elected representatives. Planning is subordinate law-making. A plan prescribes the rules and law governing peoples' property and their rights to affect how their neighbours use their property. 'Co-management' and 'partnership' in law making between local government and Māori provides for law making by non-elected people. It is indisputably incompatible with the principle of equality of citizens. It negates democratic control of local government powers.
4. The proposed amendments enhance existing preferential treatment already given to iwi. They embed in law privileges that depend on ethnic identity. They entrench permanent ancestral authority. They bypass democracy's prospect of ejection of the powerful by those subject to power, for non-performance or abuse of that power.
5. We all share, without any distinction, interests in clean air, clean water, unpolluted soil, preservation of plant and animal diversity, views, unspoiled public space, provision for services and roads, public facilities and flood prevention.
6. The iwi provisions are directed to giving one racial group superior legal status. They discriminate, giving unearned inherited power over fellow citizens and over the local government organs that should be there for all without discrimination.

7. We take you now to the examples of the effect on other citizens of giving a select group special legal status, described in more detail in the appendix.
 - a) Proposed Auckland Unitary Plan and Independent Maori Statutory Board – up to 18,000 property owners affected by new overlay with no prior warning or consultation;
 - b) Cultural Impact Assessment for Euroclass Design and Build – iwi demand \$250,000 for CIA and end up finding no relevant issues;
 - c) Hauraki Gulf steering group – Hauraki Gulf Spatial Plan being developed by a group, of which half the members are unelected mana whenua;
 - d) Kaipara Harbour CIA – property owners forced to pay for CIA that delays building, and makes fundamental factual errors.

No normal constitutional mechanism to constrain corruption

8. Democracy is our most powerful way of limiting corruption. History shows us that at times man will abuse power given without accountability, and without prospect of democratic ejection.
9. The iwi provisions give a major role to unelected people. They go against the fundamental rule of law principles: “law should not be used to harm or benefit a particular group”, and “rules should apply to everyone affected by it equally”. They contain few of the transparency and other safeguards that come from long constitutional experience. They ignore the painfully established rules (such as open tendering, conflict of interest prohibitions) that prevent local corruption.
10. The Bill’s iwi provisions sacrifice our political birth right. They abandon the rule of law conventions and protection that distinguish the fortunate few countries under democratic rule from those where oppression is endemic. Centuries of painful experience have gone into building that inheritance. This Bill

simply over-rides it. It gives crucial influence and power to people whose express purpose is to favour their own.

No excuse

11. The government has not explained why being Māori qualifies for this privilege. There is nothing in the Treaty of Waitangi to justify it.
12. International law excuses some affirmatives action. But it is clear that it is to be temporary, only in respect of identified previous disadvantage, and to end as soon as possible. The Bill's provisions are not accompanied or justified on any of these grounds.

Not opposition to respecting history, or courtesy toward cultural values

13. Democracy Action supports identification of and protection of sites and places of archaeological importance. History is important for all cultures.
14. But these provisions are not confined in purpose or authority. There is nothing in them to focus and restrict the power to matters where iwi representatives will have special knowledge or skills. There is no attempt to ensure that iwi participation does not dilute or trump the expertise brought to bear by their fellow citizens.
15. The Bill does not try to ensure that the people who will exercise these powers can bring something useful to the table. It seems to presume a special contribution or expertise by way of an inherited right.

Summary

16. The Bill needs major excisions to protect not only on the democratic rights of citizens who are not representatives of local iwi, but also the ability of councils to act in the best interest of all their citizens.
17. The specific clauses that our submission relates to have been divided into the following sections:

- a) Iwi Participation Arrangements
- b) Early consultation with iwi on draft plans and policies
- c) Hearing commissioners
- d) Resource Consent applications
- e) Streamlined planning process

RECOMMENDATIONS

Recommendation 1:

18. Democracy Action opposes all provisions in the Bill which give iwi preferential treatment. In particular, the following clauses should be removed:

- a) 13 (new section 32(4A)),
- b) 16 (new section 34(1A)),
- c) 38 (new Subpart 2 on IPAs) plus any other references to the IPAs,
- d) 125 (new section 95B),
- e) Schedule 1: new clauses 1A, 4A, 5A(8)(e), 74

Recommendation 2:

19. Democracy Action would support new provisions in the RMA to ensure:

- a) No provision for consultation or involvement in RMA decision-making may privilege or disadvantage any group determined by reference to any of the prohibited grounds for discrimination in the Human Rights Act.
- b) No person or group of persons is given procedural or substantive advantage under the RMA without objective and merit-based justification, by reference to the sustainability and environmental purposes of the Act.

- c) No criteria for being notified on resource consent applications that affect them is based on race (including iwi membership or representation).
- d) Any identification of sites, places or overlays added to district or regional plans with effect on owners, including those that purport justification because of special significance to Maori, go through a rigorous prior process for validation.
- e) All affected property owners are notified of proposed overlays or status before they have enforceable effect.
- f) Property owners must have reasonable opportunity to object to proposed overlays, and assessment against secular objective criteria. Property owners not to be subjected to 'spiritual' or untestable provisions in the RMA.
- g) That a national policy statement under Part 5 of the RMA must not contradict any fundamental rights under the International Covenant on Civil and Political Rights including (but not limited) to Article 26: "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".
- h) Reversal of the 2013 amendment to section 88 and Schedule 4 of the RMA which enable consent authorities to allow CIA requirements and consultation with iwi as de facto mandatory procedures.
- i) That where current provisions in the RMA remain which give Māori a special status they are subjected to new stipulations for probity and value audits and conflict of interest rules (and any other mechanisms) that are now routine expectations for proper exercise of delegated administrative and political power.
- j) An iwi which benefits from any arrangement conferring special influence or procedural or substantive rights must be subject to the Auditor General, and Ombudsman's jurisdiction.

- k) A strengthened version of the proposed s 7A (agreed by Cabinet in 2013) to require decision-makers to ensure that restrictions are imposed on the use of private land only to the extent reasonably required to achieve the purpose of the Act.
- l) People (including iwi) who take particular benefit from restrictions (as opposed to general public good), should have to compensate owners for the losses from those restrictions. That would make RMA decision-makers think about property rights and the true social costs of their rules more explicitly than they have done in the past.
- m) Iwi which exercise powers under any arrangement under the RMA have a statutory duty of care to fellow citizens (including to be timely). The provisions could clarify who within iwi bear that liability, because it would not be fair to impose it on iwi members who know nothing of an unfair or careless exercise of authority, and who will probably never benefit from it. Iwi members should be liable for actual negligence and pay for the normal remedies for abuse of power or bad process.
- n) The provisions should have mechanisms to make it practically enforceable, including:
 - o A right to have a Disputes Tribunal decide on recovery;
 - o A clear requirement that iwi must compensate unfairly affected citizens for court and other process costs, and for the costs of unreasonable delay, attributable to their careless acts or omissions.

Recommendation 3:

20. Democracy Action request a new Regulatory Impact Statement and rigorously tested answers be provided on:

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- a) the risks to iwi of conferring the new powers without any protections against these powers being used in a corrupt way
 - b) the need to elevate the special status given to Māori in the RMA – is there evidence that Māori have experience or knowledge relevant to the new provisions?
 - c) the costs to society generally resulting from the new iwi provisions

SPECIFIC COMMENTS:

IWI PARTICIPATION ARRANGEMENTS

- Clause 38 (new sections 58K to 58P)
- Schedule 1, new clauses 1A, Part 4

21. We oppose these provisions because:

- a) They would give statutory authority to processes and arrangements that could affect anything the parties describe as objectives (wittingly or unwittingly) with no safeguards on scope or outcomes;
- b) They could be used in a way that harms other citizens;
- c) The prescribed content of the IPAs is all procedural. New section 58M contains no constraint on the range of matters a council might subordinate to requirements for agreement between the participants. This matters greatly since Councils acquired powers of general competence, and the RMA includes vague references to cultural and social matters.
- d) It contains nothing to reserve or protect the over-riding authority of the elected Council and its duty to all citizens and their right to equal treatment;
- e) There is no restriction on such arrangements giving binding authority over the elected Council;
- f) The Bill explanation claims it is to achieve consistency. The only consistency achieved by provisions for IPAs is that local authorities must have them whereas at present many Councils have reflected their community wishes not to create race discrimination;
- g) There is no consistency required on what they say and therefore no certainty in how they will be used.
“Inconsistency” across the country could increase;
- h) The proposed IPAs will likely contain aspirational criteria and statements of objectives that could be capable of being given trump status by officials. They may become

the basis of new discretions and powers exercised mainly by officials;

- i) There are no safeguards to prevent uncompensated detriment to property owners;
- j) The IPAs could be used in combination with existing sections 33, 36B to 36E, to accelerate the number of co-management or co-governance arrangements. This would be contrary to the principles of equality in the Rule of law and plain property rights protection in Article 2 of the Treaty;
- k) The Bill is silent on who pays for the process leading up to an IPA and the ongoing consultation with iwi once an IPA is in place. We expect councils will feel they are obliged to allocate funding to iwi authorities in order to “enable” them to engage in the IPA process (i.e. as required under the consultation obligations in clause 3B of Schedule 1 of the RMA).

EARLY CONSULTATION WITH IWI ON DRAFT PLANS AND POLICIES

- Clause 13
- Schedule 1, new clause 4A

22. We oppose these provisions because:

- l) They breach the fundamental rights to equality of all citizens.

23. They could lead to situations as with the Proposed Auckland Unitary Plan which has harmed up to 18,000 property owners by adding a new overlay for Sites and Places of Value to Mana Whenua with no prior warning or consultation given to

affected property owners and no real evidence that the overlays were justified.¹

HEARING COMMISSIONERS

- Clause 16, new section 34A(1A)

24. We oppose these provisions because:

- a) Commissioners should be appointed on merit. The provisions appear instead to be designed to ensure “iwi” representation. Commissioners are judicial. They should not be there to take sides.
- b) If functional group representation is considered likely to produce more expert, objective, unbiased decision-making the Bill would have proposed nomination rights by groups such as environmental scientists, farmers, foresters, fishers, landscape architects, engineers and others within objectively assessed qualifications and expertise.
- c) They have no provisions to guard against conflicts of interests.

CONSENT APPLICATIONS

- Clause 125, new sections 95B, 95E

25. We oppose these provisions because:

- a) They will give iwi a higher special status than they currently have and more power and control than members of the public.
- b) They could bring iwi into conflict with their neighbours and other New Zealanders.
- c) They may undermine property rights generally.

¹ Chris Hutching “Up to 18,000 properties affected by taniwha tax” in National Business Review, 15 April 2015 (available at <http://www.nbr.co.nz/article/18000-properties-affected-taniwha-tax-ch-171435>)

STREAMLINED PLANNING PROCESS

- Schedule 1, new clauses 5A, 6A, 74(b)(iv)

26. We oppose these provisions because:

- a) Even if these are hardly ever used, they would potentially allow iwi to be consulted on plan changes while other citizens are not consulted, or have their concerns ignored ;
- b) Laws should not be made on the likelihood they will never or seldom be used;
- c) Limited notification for both plan changes would limit public participation while enhancing iwi participation. This is new. It goes against the special consultative procedures in the LGA. It will give iwi a higher special status than they currently have and more power and control than members of the public. This could bring iwi into conflict with their neighbours and other New Zealanders.

APPENDIX – PRACTICAL EXAMPLES OF THE EFFECT ON OTHER CITIZENS OF GIVING A SELECTED GROUP SPECIAL LEGAL STATUS

AUCKLAND COUNCIL EXAMPLE: PROPOSED AUCKLAND UNITARY PLAN

1. The Proposed Auckland Unitary Plan (PAUP) provides an example of participation arrangements under which a council has been obliged to undermine the democratic system (by a statutory board of unelected persons). Part 7 of the Local Government (Auckland Council) Act 2009 establishes an independent statutory board whose purpose is to “assist the Auckland Council to make decisions, perform functions, and exercise powers” by “promoting cultural, economic, environmental, and social issues of significance for –mana whenua groups and mataawaka of Tamaki Makaurau; and ensuring that the Council acts in accordance with statutory provisions referring to the Treaty of Waitangi”².
2. This board is the Independent Maori Statutory Board (IMSB). It is independent from the Council and not required to accept any direction from the Council or “any person”. Members of the board get to sit on each of the Council’s committees that “deal with the management and stewardship of natural and physical resources” and may sit on other Council committees if invited to by the Council.³
3. The Board has 9 members appointed by a ‘selection body’ nominated by mana whenua groups.⁴ There is no election of members and they are not accountable to the Council or the citizens of Auckland.
4. Advice from Franks Ogilvie to Democracy Action states:⁵

That IMSB action has damaged Auckland Council. The Council has backtracked over the Mana Whenua provisions

² Section 81 Local Government (Auckland Council) Act 2009

³ Section 85 Local Government (Auckland Council) Act 2009

⁴ Schedule 1, clause 2 and 4 Local Government (Auckland Council) Act 2009

⁵ Franks Ogilvie advice to Democracy Action on the Resource Legislation Amendment Bill, at para 183

in the PAUP (e.g. the mandatory requirement for a cultural impact assessment) and reduced the number of SPVMWs in its evidence before the Auckland Unitary Plan Independent Hearings Panel. Nevertheless they are still in force until the final unitary plan is approved.

5. These provisions create the potential for iwi to apply restrictions on property developments within Auckland. They can create a significant financial obstacle for property owners.⁶
6. Despite the PAUP taking years to draft and develop, 3600 'Sites and Places of Value to Mana Whenua' were added to the PAUP in the final days before it was notified and released for consultation. This was done at the insistence of the IMSB.⁷
7. The Auckland Council allocated \$200,000 to engage with Auckland's 19 Mana Whenua groups during the preparation of the PAUP.⁸ The Auckland Council says that of the \$30 million projected costs for the Unitary Plan and Independent Hearings Panel, "approximately one seventh of the costs were associated with preparing provisions which respond to the Treaty of Waitangi and associated consultation with Mana Whenua"⁹. No other groups were allocated funding to engage with the Council in the PAUP process.
8. Property owners that have one of these sites close to (within 50 metres), or on their properties, are affected and yet not consulted. The PAUP requires resource consent applicants carrying out work on or near these sites to seek a "cultural impact assessment" from one or more of 19 iwi groups. There are no rules on how these CIAs are done, how much they cost or why they are even needed. This mandatory obligation was

⁶ See "Taniwha Tax": Briefing Paper on Auckland Council's New Mana Whenua Rules" by Taxpayers Union

⁷ See letter from Auckland Council to Lee Short, Democracy Action, 23 October 2014.

⁸ See letter from Auckland Council to Lee Short, Democracy Action, 23 October 2014, answer to question 4

⁹ See letter to Jordan Williams from Auckland Council 25 August 2014, at pages 1-2

given immediate legal effect though the PAUP is still not finalised 3 years later.

9. We understand some Auckland Council councillors were unaware of the addition of the sites. There was no analysis of the sites done as required by section 32 of the Local Government Act 2002. Auckland Council has since admitted there was no robust evidence to show the sites were of “value” to Mana Whenua. The Council should have done site checks before they were added. Property owners should have been notified.
10. Council officials have since admitted 1373 of the sites were either duplicates, not of Maori origin, not of value to mana whenua or without an accurate location.¹⁰ Despite this the Council agreed to remove only 600 (this will not take effect until the PAUP is finalised).
11. All 3600 sites should be removed until a robust evidence of archaeological value has been provided and affected property owners consulted.

AUCKLAND CIA: EUROCLASS DESIGN AND BUILD EXAMPLE

12. The following shows how Council requirements for cultural impact assessments can result in extortion and corruption. The evidence of Dr Kenneth Palmer to a hearing of the Auckland Unitary Plan Independent Hearings Panel provides detail on this example (see enclosed). Although this example started in 2009 when Manukau City Council was in existence, the issue is ongoing.
13. Peter Bishop, director of Euroclass Design and Build, was directed by Council in 2009, under section 92 of the Resource Management Act 1991, to obtain a CIA in relation to a proposed subdivision of 40 ha of land at Wiri.
14. Prior to this, in 2008, Mr Bishop was advised by iwi that a CIA would cost \$250,000. He refused. The amount

¹⁰ Marian Slade “Council removes fewer Mana Whenua sites than planned” in AuckalndNow 12 November 2015

requested in writing was reduced to \$150,000. He refused again. Euroclass investigated retaining archaeological experts and developing a protocol and assurances for dealing with finding koiwi. In the presence of an independent witness the nominated iwi representative said they were “not interested in finding bones or artefacts”, they wanted land and money. The same iwi on an adjacent site told the landowner a 5 m boat with a 115 hp outboard would suffice.

15. Ultimately Euroclass could not afford the continuing delays. It paid Ruru Environmental Consultants \$34,250 for a CIA. No CIA was done. Instead a series of instructions were given. In addition to the demands for money, there were deliberate delays, refusals to meet and a lack of transparency regarding payments when Euroclass asked for evidence that the iwi would benefit.
16. Council officers were informed at various times of the extortionate demands but declined to intervene, or to modify or withdraw their requirement. Effectively they told Euroclass it was not Council’s concern. Euroclass advised the council officers that they personally are legally implicated in the extortion.
17. The PAUP lists a number of “Sites and Values of Significance to Mana Whenua” on this land. This will mean (or has meant) a fresh round of consultation and CIAs in respect to further resource consents required for further stages of the development- despite the CIA done by Ruru Environmental Consultants finding no relevant issues .

HAURAKI GULF EXAMPLE

18. The Hauraki Gulf Forum is a statutory board established under the Hauraki Gulf Marine Park Act 2000. It is administered by Auckland Council. Members include:
 - a) 3 representatives of the Ministers of Conservation, Fisheries and Māori Affairs

- b) 12 elected representatives of Auckland Council, Waikato Regional Council, Thames-Coromandel, Hauraki, Waikato and Matamata-Piako District Councils
 - c) 6 representatives of the tangata whenua of the Hauraki Gulf and its islands, appointed by the Minister of Conservation.
19. The purpose of the Forum is to “promote and facilitate integrated management and the protection and enhancement of the Hauraki Gulf”.
20. A group of people within various councils and the Hauraki Gulf Forum proposed that a new steering group be formed to develop a Hauraki Gulf Marine Spatial Plan for the future of the Hauraki Gulf. One of the Tangata whenua members of the Forum, Paul Majurey, insisted that mana whenua have equal representation in the steering group, and it not be a subcommittee of the Forum.¹¹ He proposed the group comprise of 8 iwi representatives and 8 representatives of local government and statutory agencies.
21. The recommendation was put in a substantive motion to the Auckland Council’s Auckland Plan Committee on the 12 February 2013. The two IMSB member’s votes on the this committee tied the result, so the chair, Penny Hulse from Auckland Council, exercised a casting vote, voting in favour of the motion.¹² Therefore the outcome of this vote was determined by the two Independent Maori Statutory Board members, who are unelected by and unaccountable to the citizens of Auckland.
22. Councillor Mike Lee is reported to have said there already exists a statutory board of 21 members, 15 of whom are democratically accountable, to deal with Gulf issues – the Hauraki Gulf Forum – and it was bizarre to suggest setting up

¹¹ Brian Rudman “Bid for new forum a power grab” (NZ Herald, 22 October 2012, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10842003)

¹² Auckland Plan Committee meetings on 2 October 2012 and 12 February 2013 (see Resolution no. APC2013/3 in the enclosed minutes of 12 February 2013 meeting)

a up a "bureaucratic monstrosity" dominated by unelected people in its place.¹³

23. The steering group is in charge of making a spatial plan for the Hauraki Gulf which is expected to cost around \$1.8 million. The project is called "Sea Change"¹⁴.

24. Members of the Steering Group are:

- Liane Ngamane: mana whenua
- Paul Majurey (co-chair): mana whenua
- Pirihira Kaio: mana whenua
- Shane Ashby: mana whenua
- Terrence Hohneck: mana whenua
- Jodi-ann Warbrick: mana whenua
- Nicholas Manukau: mana whenua
- Karen Wilson: mana whenua
- Mayor John Tregidga: Hauraki Gulf Forum
- Cr Mike Lee: Auckland Council
- Cr Penny Webster (co-chair): Auckland Council
- Cr Peter Buckley: Waikato Regional Council
- Cr Timoti Bramley: Waikato Regional Council
- Cr Peter French: Territorial authorities
- Alice Marfell-Jones: Ministry for Primary Industries
- Meg Poutasi: Department of Conservation

25. This effectively means that 8 unelected and unaccountable members are 50% responsible for developing a Marine Spatial Plan for the Hauraki Gulf. Auckland Council only has two members on the steering group to represent 1.5 million citizens. Coromandel, with an extensive coastline, only has one member on the steering group.

¹³ Michael Dickison "'Monstrosity' for Gulf" (NZ Herald, 2 October 2012, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10837818

¹⁴ The project's website is <http://www.seachange.org.nz/Whos-on-board/Project-Steering-Group/>

26. This is another example of co-governance over a valuable natural resource. The power and authority of one side, iwi, is disproportionate.

KAIPARA DISTRICT COUNCIL EXAMPLE: CULTURAL IMPACT ASSESSMENTS

27. The Te Uri o Hau Claims Settlement Act 2002 established a number of 'statutory areas' which have a statutory acknowledgment of the special association of Te Uri o Hau with those areas. These cover a large part of the Northern Kaipara area including Mangawhai Harbour and Kaipara Harbour and coastal marine areas from north of Wellsford in the south to Pikawahine in the north. The areas cover land from the West Coast to the East Coast.
28. Under section 64 of the Te Uri o Hau Claims Settlement Act 2002 the Te Uri o Hau Claims Settlement (Resource Consent Notification) Regulations 2003 require consent authorities (local authorities in whose district or region the statutory areas are located) "to forward to Te Uri o Hau Settlement Trust a summary of every application for a resource consent for activities within, adjacent to, or impacting directly on a statutory area" (reg 4(1)). The Trust may waive its right to receive these.
29. The Act also says "the lawful rights or interests of any person who is not a party to the deed of settlement are not affected by either...a statutory acknowledgment or a deed of recognition" (s 72). This would suggest the rights of property owners are unaffected by the Act or Regulations.
30. This is far from reality. In effect Te Uri o Hau Settlement Trust through its environmental arm, Environs Holdings Limited, act as decision-makers on resource consent applications made to Kaipara District Council (KDC)¹⁵. It has turned itself into a parallel consent-granting authority even

¹⁵ Other consenting authorities affected are Northland Regional Council and Auckland Council. In effect this is a type of dual governance. Environs Holdings Limited has a Memorandum of

when it is unable to point to anything of cultural significance in a proposed activity. KDC has given Te Uri o Hau legal rights to interfere with a person's building matters, despite the Act saying "the lawful rights of any person...are not affected".

31. The KDC website says:¹⁶ [our emphasis]

Consulting with Iwi

*In accordance with Schedule 11 of the Resource Management Act 1991, the Te Uri O Hau Claims Settlement Regulations 2003 and the Memorandum of Understanding between Te Uri and Kaipara District Council, the Resource Consents Team at Kaipara has **a duty to consult with Iwi over resource consent applications affecting their rohe or territory.***

*In order to simplify and streamline the processing of resource consents, Council has reached an agreement with Te Uri O Hau regarding minor consent applications as of February 2015, where the majority of applications are no longer sent to Environs Holdings for comment. However **significant consent applications are still of interest to Iwi and require input from Environs Holdings Ltd.***

*Having regard to the Environs Holdings Ltd [Cultural Monitoring Protocols and Policies 2015-2016](#), the following types of resource consents **will not be accepted by Council and determined as complete for processing under Section 88 of the RMA unless written evidence of prior consultation with Environs Holdings Ltd is included as part of the application.***

- *All applications on land zoned for Maori Purposes, or located near Marae;*
- *All applications on land involving known archaeological sites;*

Understanding with the Department of Conservation, KDC, Northland Regional Council and Auckland Council.

¹⁶ Available at

<http://www.kaipara.govt.nz/Service++Info/Building++Planning/Resource+Consent+Information/Consultation+with+Neighbours+and+Iwi.html>

- *Mining, quarrying and forestry activities in the Rural Zone;*
- *Subdivisions within 300m of the coast/areas zoned of Significance to Maori (including Kaipara and Mangawhai Harbours);*
- *Earthworks within 300m of the coast/areas zoned of Significance to Maori (including Kaipara and Mangawhai Harbours);*
- *Indigenous vegetation clearance;*
- *All activities in Outstanding Natural Landscapes; and*
- *All activities within or immediately adjacent to the following Nohoanga and Deeds of Recognition sites listed in Schedule 17.2 of the District Plan:*
 - *Pouto Stewardship Area*
 - *Lake Whakaneke*
 - *Lake Mokeno*
 - *Pukekararo Scenic Reserve*
 - *Tokatoka Scenic Reserve*
 - *Te Taa Hinga.*

Please note that the above list is not final and is subject to revision.

Evidence of consultation may include a Cultural Impact Assessment, short form assessment or an email confirming Iwi have no issues with your proposal. The cost of consultation with Iwi is the responsibility of the applicant. *The purpose of requiring consultation prior to the lodging of consent is to avoid delays to the processing of consents and allow Environs more time to respond to consultation queries.*

Environs Holdings may be contacted via 09 459 7001 or email environs@uriohau.co.nz .

32. The 'Te Uri o Hau Cultural Monitoring Protocols & Policies' 2015-2016 says:¹⁷

"Under section 64 of the Te Uri o Hau Claims Settlement Act 2002, Councils are required to send a summary of their

¹⁷ Available at:

<http://www.kaipara.govt.nz/site/kaiparadistrictcouncil/files/pdf/Resource%20Consents%20Info/EHL%20Cultural%20Monitoring%20Protocols%20%20Policies%202015%20-%202016.pdf>

resource consent application to Environs Holdings Limited. This is supported by the Te Uri o Hau (Resource Consent Notification) Regulations 2003, Local Government Act 2002 and the Resource Management Act 1991.”

33. This is not correct as section 64 of the Te Uri o Hau Claims Settlement Act 2002 only allows regulations to be made that require consent authorities to send Te Uri o Hau governance entity “a summary of any applications received for resource consents for activities within, adjacent to, or impacting directly on statutory areas”. It does not require **all** applications to be sent.
34. There is a long list of “key interests” including “activities within 200 metres of a river, lake, wetland or the coastline”.
35. A table of Environ fees and payments (ranging from \$30 per hour to \$80 per hour as well as mileage of .70c km).

Evidence of misuse

36. Democracy Action has evidence that Te Uri o Hau are using these new powers to assert control over land that was legally disposed of by Maori many years ago. It is also using the statutory privileges in a money-earning capacity. This is done by requesting CIAs despite there being no demonstrated need for one (no possible cultural impacts, nothing relevant to the key interests in the ‘Protocols and Policies’ document).
37. The full details cannot be provided as property owners who have provided the information are still in the process of building or expect to need consents in the future. Evidence seen by Democracy action includes various communications with the council, and a cultural impact assessment report by Environs Holdings Limited.
38. KDC made a “request for further information on resource consent application” to the applicant and said in that request “we are not able to sign off on the above application without the approval of Te Uri O Hau”.

39. The example CIA report is over 25 pages long with only 6 pages on the specific property. Most of the report is general information such as:

"Te Uri o Hau inherent right as kaitiaki includes the right to participate in the decision making process affecting natural resource management within Te Uri o Hau estates and territory: statutory area of interest under Article 2 of Te Tiriti o Waitangi 1840 (Treaty of Waitangi 1840)."

40. KDC know of the following faults with the report and process:

- a) No preliminary assessment on whether or not a CIA was required (no attempt to establish that the proposed activities might have a cultural impact). If there had been, it would have been very apparent there was no need for a CIA;
- b) No indication by Environs on how long it would take and how much it would cost. The report took over 100 days to prepare (delaying building by at least that time) at a charge of over \$3,500. This does not include the costs of the delay (between \$25,000 and \$35,000) and the costs of complying with the recommendations made in the report (approximately \$10,000);
- c) The CIA report did not identify what aspects of the proposed activities would impact on cultural values or what those values were;
- d) It did not identify how its recommendations would mitigate any risks to cultural values;
- e) It made demands for further intervention by Environs (i.e. further sites visits and demanding that no earthworks in winter or unless Environs/kaitiaki present);
- f) It was factually incorrect on fundamental matters (e.g. claiming an archaeological site is on the property when in fact it is located close to 1 kilometre away);
- g) It made resource consent recommendations that were not only irrelevant but in some regards would have been

legally impossible to comply with (e.g. planting on a neighbour's property);

h) It exceeds its scope by making building demands.

41. When the property owner complained to KDC, KDC agreed to set aside all recommendations made in the CIA

RMA amendment 2015

42. This example shows how the amendments to section 88 and Schedule 4 of the RMA which took effect on 3 March 2015 have subverted and negated the preliminary step of assessing whether or not a CIA should be done. The effect of these amendments is that if iwi say they have an interest in the application (claim to be affected) then Councils are in practice making a CIA is more or less mandatory.

43. Previously section 88 allowed consent authorities up to five working days to decide whether to accept or return applications that they deem to be incomplete. Section 88(3A) was amended so that if a consent authority determines that an application is incomplete it **must** return the application. The previous version stated that the consent authority **may** return an application that is deemed to be incomplete.¹⁸ This change from "must" to "may" means, in practice, the applicant is not given a chance to provide any extra information that a council considers is required.

44. Under the new law the consent authorities have 10 working days then they must return applications that they determine to be incomplete. The consent authority only has discretion to decide if the application is complete.

45. The requirements in Schedule 4 are more prescriptive and include: "identification of the persons affected by the activity, any consultation undertaken, and any response to the views of any person consulted" (clause 6(1)(h)).

¹⁸ See Ministry for the Environment "A guide to section 88 and Schedule 4 of the Resource Management Act 1991" (2014)

46. Clause 7(1) of Schedule 4 sets out "Matters that must be provided in an assessment of environmental effects". Prior to this amendment Schedule 4 clause 2 had "Matters that should be considered when preparing an assessment of effects on the environment". Replacing the word "**should**" with "**must**" makes it mandatory for an application to include information on any of the effects listed under clause 7(1). Clause 7(1)(d) refers to "any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural value, or other special value, for present or future generations:" (our emphasis).
47. The term "effect" is defined in section 3 of the RMA to mean "any potential effect of low probability which has a high potential impact". How will an applicant be able to assess whether their proposed activity will have a potential effect on the spiritual or cultural values of local iwi without asking them? What does 'spiritual or cultural values' mean? Applicants are not obliged to consult with any person under s 36A of the RMA. The 2015 amendments make it a risk to lodge an application without first going through the expensive and time consuming process of consulting with local iwi and paying for a cultural impact assessment.
48. Before March 2015 there used to be a decision point, whereby a preliminary assessment of a site was made to decide whether a formal Cultural Impact Assessment (CIA) was required. According to the resource consent applicant's building company, this useful step was made redundant by the March 2015 changes. Their understanding of the amendment is that if Maori say they have an interest in an area/site, the requirement for seeking a CIA becomes mandatory. If Maori claim they are affected and the property owner does not consult with them, then this would, on the face of it, be a reason for the consenting authority to reject the application.
49. Although the applicant can go away, consult with anyone who claims to be affected, then reapply, this costs in

terms of new application fees, costs of the consultation (CIA costs), delay in building and so on.