

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations

Proactive release – Takutai Moana financial assistance scheme — additional funding

Date of issue: 16 March 2020

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

No.	Document	Comments
1	Takutai Moana financial assistance scheme — additional funding Cabinet paper Office for Māori Crown Relations: Te Arawhiti 28 November 2019	Information in this document has been withheld under section 9(2)(f)(iv) under the Official Information Act 1982, as it is necessary to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.
2	Cabinet Māori Crown Relations: Te Arawhiti Committee Minute of Decision Cabinet Committee Minute MCR-19-MIN-0051 Cabinet Office 3 December 2019	Information in this document has been withheld under section 9(2)(f)(iv) under the Official Information Act 1982, as it is necessary to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

In Confidence

Office of the Minister for Treaty of Waitangi Negotiations

Chair, Cabinet Māori Crown Relations: Te Arawhiti Committee

Takutai Moana financial assistance scheme — additional funding

Proposal

1. I seek agreement to:
 - 1.1. provide additional funding of \$6.372m from the Takutai Moana financial assistance scheme to 42 applicant groups that will appear before the High Court for the hearing of the *Edwards* application [CIV-2011-485-817];
 - 1.2. provide additional funding of \$3.218m to increase the amount of funding generally available from the scheme for interlocutory hearings, for all applicant groups proceeding through the High Court; and
 - 1.3. withheld under s 9(2)(f)(iv)

Executive Summary

2. Pursuant to section 125 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act), the *Edwards* application [CIV-2011-485-817] is a priority application that will be heard by the High Court. The hearing will begin on 17 August 2020 and is scheduled for eight weeks (or 40 working days). In addition, the application is overlapped by 41 other applicant groups who will also make an appearance in the hearing, some of whom will present detailed cases to support their claims for customary interests in the *Edwards*' application area.
3. The current settings of the Takutai Moana financial assistance scheme (the scheme) are not sufficient for applicant groups to prepare for and appear in a 40-day High Court hearing. To ensure that the Crown is making an appropriate contribution, I recommend that an additional \$6.372m be made available from the scheme for the 42 applicant groups over and above their current funding limits.
4. A decision on the additional funding must be made now, as preparatory work by applicant groups in the *Edwards*' application is well underway. The primary applicant, *Edwards*, has already exhausted their funding for legal counsel to prepare for the hearing.
5. Secondly, due to the way the High Court is managing applications, applicant groups and legal counsel have advised officials that the scheme's provision for interlocutory hearings is inadequate. I recommend a small increase of \$7,950 per applicant for interlocutory hearings, for all applicant groups proceeding through the High Court. This will cost \$3.218m over 2019/20 to 2023/24.

6. The recommendations in this paper will create a shortfall to the *Non-Departmental Other Expenses: Contribution Toward Determining Customary Interests in the Marine and Coastal Area (M74)* appropriation (the appropriation) under Vote Treaty Negotiations. The projected shortfall is \$0.214m in 2022/23, and \$8.557m in 2023/24. Cabinet Office circular CO (18) 2 requires that these recommendations be brought to Cabinet for its consideration. s 9(2)(f)(iv)

Background

The Takutai Moana financial assistance scheme

7. In March 2012, Cabinet agreed to the development of the scheme for applicant groups to progress their applications under the Act, as they do not qualify for any financial assistance under the Legal Services Act 2011. Cabinet also authorised the Minister of Finance and the Minister for Treaty of Waitangi Negotiations to develop and approve the detailed policy and operational procedures of the scheme [CAB Min (12) 7/5 and TOW Min (12) 1/1].
8. The scheme provides a contribution to the costs of progressing an application under the Act. The contribution is set at 85 percent of assumed costs. The intent of the scheme has been to strike a balance between:
 - 8.1. providing access to justice for applicant groups; and
 - 8.2. ensuring there is certainty as to the scheme's overall cost to the Crown; and
 - 8.3. obtaining maximum value from the money provided.
9. The scheme was designed and developed prior to the 3 April 2017 deadline for applications under the Act. After the deadline, 385 applications were made to the Crown, and 202 applications were made to the High Court. This has resulted in a high degree of complexity and overlap between applications.
10. In September 2019, the Minister of Finance and I, as the responsible Ministers, approved a comprehensive review of the scheme. The review is expected to be completed by mid-2020.

The Edwards application

11. The *Edwards* application [CIV-2011-485-817] was made under the previous Foreshore and Seabed Act 2004 (the 2004 Act) by the late Claude Edwards on behalf of Te Whakatōhea. As the application was made under the 2004 Act, the High Court is required to give it priority over applications subsequently made under the current Act.
12. The application is for customary marine title and protected customary rights in the Common Marine and Coastal Area abutting approximately 80 kilometres of coastline in the eastern Bay of Plenty. Forty-one other applications overlap it, as illustrated in the maps included as Appendix 1.

13. The hearing for *Edwards*, including the high level of overlaps, reflects the potential complexity both the High Court and the Crown face in considering applications under the Act in certain geographical areas. The High Court set down a timetable to progress the application, with the hearing scheduled for eight weeks (40 days) starting on 17 August 2020.

Interlocutory hearings

14. The High Court has been using interlocutory hearings to manage and understand the readiness of applicant groups to progress applications. It has proved an efficient use of the High Court's time and applicant resources. In a series of hui in 2018, applicant groups and their legal counsel advised officials of the lack of appropriate funding for these interlocutory hearings.

Cabinet Office circular CO (18) 2

15. The recommendations I am making are projected to create a shortfall in the appropriation by 2022/23. Therefore, the Minister of Finance and I, as the Ministers responsible for the scheme, lack the authority to make a decision under Cabinet Office circular CO (18) 2. The circular requires that these recommendations be considered by Cabinet.

Review of the financial assistance scheme

16. A comprehensive review of the scheme is underway. The Office of Māori Crown Relations – Te Arawhiti is leading this work and expect it to be completed by mid-2020. From the risks I have highlighted in providing additional funding and the increase needed in the long term to fund applicant groups to attend interlocutory hearings, the review may recommend significant changes to the scheme. Therefore, I will report back to Cabinet on the results of the review and how I, in conjunction with the Minister of Finance, propose to proceed.

Additional funding for applicant groups in the *Edwards* hearing

17. The length of the *Edwards* hearing [CIV-2011-485-817] has resulted in applicant groups facing a financial barrier in their ability to progress their applications. The scheme did not anticipate that the High Court would set down a hearing for 40 days. For highly complex applications, such as the groups involved in the *Edwards* hearing, the scheme only covers the costs for a 15-day hearing.
18. According to the High Court Rules 2016, a 40-day hearing could entail 47.5 days of preparation. For highly complex applications, such as those of the groups involved in the *Edwards* hearing, the scheme only covers the costs for 21 days of preparation.
19. I recommend that all the applicant groups appearing in the hearing for the *Edwards* application be funded under the scheme for 47.5 days of preparation, for the 40 scheduled days of the hearing, and for any judicial conference the High Court may organise. This could amount to a maximum of \$6.372m (this amount is 85 percent of assumed costs), spread across 2019/20 and 2020/21, more than what is already available to the applicant groups.

20. It is important that a decision on the additional funding is made now as preparatory work by the applicant groups is well underway. The first due date to file and serve evidence by applicant groups was 28 October 2019, and the next filing date is 20 December. The primary applicant, *Edwards*, has exhausted their funding from the scheme for legal counsel to prepare for the hearing.
21. Providing additional funding, as a Crown contribution, will ensure the applicant groups appearing in the hearing for the *Edwards* application are sufficiently supported. It is in the Crown's interest to ensure that these applications progress without any undue delay as the hearing reflects the complexity of applications under the Act and, therefore, is akin to a test case.
22. Accessing the High Court is expensive. If funding is not provided, applicant groups may be unable to retain their legal representation or will face financial barriers to accessing justice. Applicant groups that cannot access the High Court to make a determination on their application undermines the effectiveness of the Act. If a lack of funding is the reason why applicant groups cannot retain their legal representation, it will delay the High Court hearing to give groups time to find new legal representation.
23. A delay in the High Court hearing the application may also delay its hearing of other applications. As I have alluded to the test case nature of the *Edwards* application, the sooner a determination is made by the High Court, there is more clarity, than previously, on how the tests in the Act could be applied.
24. There is a risk that providing additional funding could create a precedent for other hearings or set expectations around the outcomes of the review of the scheme. The review of the scheme will need to address funding issues arising from the *Edwards* hearing, including the length of the hearing, and how overlapping applicant groups are funded.
25. Providing additional funding to all 42 applicant groups will not mean that all their applications have had a determination by the High Court. Only the applications that fall entirely within the boundaries of the primary *Edwards* application will have had a complete determination. This means that the High Court will have another set of hearings for the remaining applicant groups to make a determination on the areas of their application that fall outside the *Edwards*' application area.
26. In addition, by the end of this hearing most of the groups would have exhausted their allocation of funding – from the scheme and the additional allocation I am recommending. Additional funding will be needed to progress hearings for these applicant groups for the High Court to have completely considered the applications in their entirety. The review of the scheme will need to address this.

Increase in funding for interlocutory hearings

27. The High Court has been relying on interlocutory hearings to manage applications. When the scheme was developed the use of interlocutory hearings by the Court was not adequately considered. With the High Court's reliance on these hearings to manage the applications, applicant groups need adequate funding to ensure their participation. The scheme allocates insufficient funding for interlocutory hearings in very complex heavily overlapped applications and affects most applicant groups in the High Court.

28. I recommend that the general funding available to applicant groups for interlocutory hearings in the High Court be increased by \$7,950 per applicant in the scheme. This is a small increase to assist all applicant groups in the High Court preparing for hearings before the review is scheduled to report back next year. The increase will cost the scheme \$3.218m over 2019/20 to 2023/24.

Consultation

29. The Treasury was consulted on this paper. The Department of the Prime Minister and Cabinet, the Ministry of Justice, the Crown Law Office, and Te Puni Kōkiri were informed of this paper.

Financial Implications

30. The proposals in this paper result in projected shortfalls in 2022/23 and 2023/24 within the Vote Treaty Negotiations *Non-Departmental Other Expenses: Contribution Toward Determining Customary Interests in the Marine and Coastal Area (M74)* appropriation. The table below sets out the projected costs of the financial assistance scheme:

Forecast of costs to the scheme from applications and the recommendations	\$m				
	2019/20	2020/21	2021/22	2022/23	2023/24
Forecasted costs of the financial assistance scheme	5.951	6.681	7.452	8.715	13.411
Recommendation for additional funding for applicant groups in the hearing for the <i>Edwards</i> application	2.312	4.060			
Recommendation to increase the amount of funding available for applicant groups in the High Court for interlocutory hearings	0.715	0.715	0.596	0.596	0.596
Total	8.978	11.456	8.048	9.311	14.007

31. The table below sets out the impact of the forecasts and recommendations on the appropriation:

Vote Treaty Negotiations Minister for Treaty of Waitangi Negotiations	\$m				
	2019/20	2020/21	2021/22	2022/23	2023/24
Non-Departmental Other Expenses: Contribution Toward Determining Customary Interests in the Marine and Coastal Area (M74)	11.229	10.450	10.450	5.450	5.450
Forecasted costs including recommendations	8.978	11.456	8.048	9.311	14.007
Impact of forecasts and recommendations on appropriations — surplus / (shortfall)	2.251	(1.006)	2.402	(3.861)	(8.557)

32. Assuming expense transfers are approved in the future, the projected shortfall from the *Edwards* and interlocutory recommendations will be \$0.214m in 2022/23 and \$8.557m in 2023/24, totalling \$8.771m over the forecast period. [REDACTED]

Impact Analysis

33. An impact analysis is not required for this paper.

Publicity

34. Following Cabinet agreement to the recommendations in this paper, the Office for Māori Crown Relations - Te Arawhiti will contact the 42 applicant groups to advise them that additional funding is available. Officials will also inform all applicant groups in the High Court of the increase in funding for interlocutory hearings.

Proactive Release

35. I intend to proactively release this paper, making any necessary redactions, within 30 business days of final decisions being taken by Cabinet.

Recommendations

The Minister for Treaty of Waitangi Negotiations recommends that the Committee:

1. **Note** additional funding is sought for 42 applicant groups in the High Court hearing of the *Edwards* application as the current Takutai Moana financial assistance scheme's funding does not extend to the preparation and attendance by legal counsel for a 40-day hearing, and the funding should be provided now as preparatory work by the groups is well underway.
2. **Agree** to the Minister of Finance and the Minister for Treaty of Waitangi Negotiations providing an additional \$6.372m from the Takutai Moana financial assistance scheme, over 2019/20 and 2020/21, to the 42 groups appearing in the High Court hearing of the *Edwards* application [CIV-2011-485-817], which will start on 17 August 2020 and is scheduled for eight weeks.
3. **Note** increased funding is sought in the Takutai Moana financial assistance scheme for every applicant group in the High Court to attend interlocutory hearings as the current level of funding is insufficient, but the increase proposed is small with the view to cover applicant groups until the comprehensive review of the scheme has been completed.
4. **Agree** to the Minister of Finance and the Minister for Treaty for Waitangi Negotiations increasing the amount of funding available in the Takutai Moana financial assistance scheme for all applicant groups in the High Court by \$7,950 for interlocutory hearings which will cost the scheme \$3.218m over 2019/20 to 2023/24.
5. **Approve** the following changes to appropriations to give effect to the policy decisions in recommendations 2 and 4 above, with a corresponding impact on the operating balance and net core Crown debt:

Vote Treaty Negotiations Minister for Treaty of Waitangi Negotiations	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24
Non-Departmental Other Expenses: Contribution Toward Determining Customary Interests in the Marine and Coastal Area (M74)	-	-	-	0.214	8.557

6. withheld under s 9(2)(f)(iv)
7. **Note** a comprehensive review of the Takutai Moana financial assistance scheme is set to be completed by mid-2020.
8. **Invite** the Minister for Treaty of Waitangi Negotiations to report back to Cabinet following the review of the Takutai Moana financial assistance scheme.

Authorised for lodgement




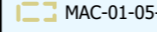
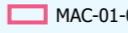

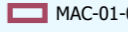
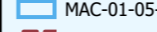
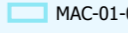
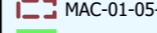
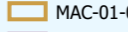
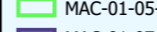

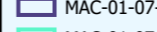
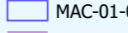
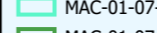
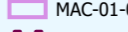
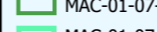
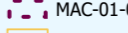
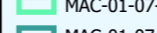

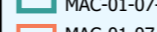
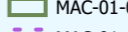
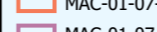
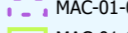
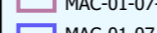
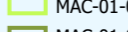
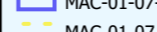
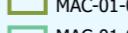
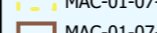
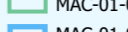
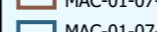
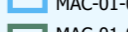
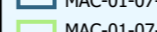

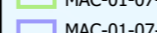
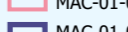
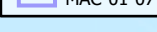
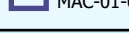
Hon Andrew Little

Minister for Treaty of Waitangi Negotiations

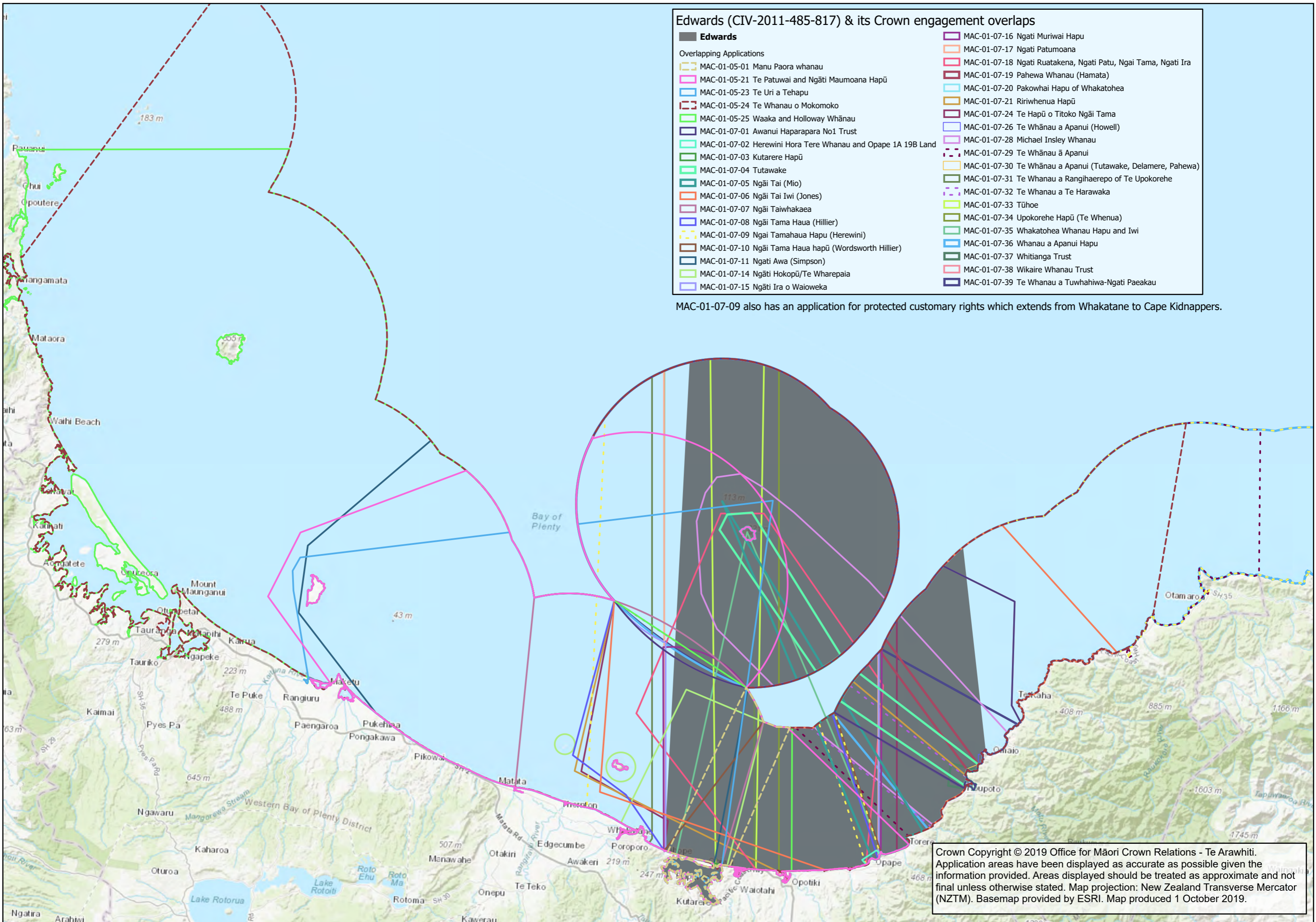
Appendix 1

Maps of *Edwards* application and overlaps

Edwards (CIV-2011-485-817) & its Crown engagement overlaps

- | | |
|--|--|
|  Edwards |  MAC-01-07-16 Ngati Muriwai Hapu |
| Overlapping Applications |  MAC-01-07-17 Ngati Patumoana |
|  MAC-01-05-01 Manu Paora whanau |  MAC-01-07-18 Ngati Ruatakena, Ngati Patu, Ngai Tama, Ngati Ira |
|  MAC-01-05-21 Te Patuwai and Ngati Maumoana Hapu |  MAC-01-07-19 Pahewa Whanau (Hamata) |
|  MAC-01-05-23 Te Uri a Tehapu |  MAC-01-07-20 Pakowhai Hapu of Whakatohea |
|  MAC-01-05-24 Te Whanau o Mokomoko |  MAC-01-07-21 Ririwhenua Hapu |
|  MAC-01-05-25 Waaka and Holloway Whānau |  MAC-01-07-24 Te Hapu o Titoko Ngāi Tama |
|  MAC-01-07-01 Awanui Haparapara No1 Trust |  MAC-01-07-26 Te Whānau a Apanui (Howell) |
|  MAC-01-07-02 Herewini Hora Tere Whanau and Opape 1A 19B Land |  MAC-01-07-28 Michael Insley Whanau |
|  MAC-01-07-03 Kutarere Hapu |  MAC-01-07-29 Te Whānau ā Apanui |
|  MAC-01-07-04 Tutawake |  MAC-01-07-30 Te Whānau a Apanui (Tutawake, Delamere, Pahewa) |
|  MAC-01-07-05 Ngāi Tai (Mio) |  MAC-01-07-31 Te Whanau a Rangiharepo of Te Upokorehe |
|  MAC-01-07-06 Ngāi Tai Iwi (Jones) |  MAC-01-07-32 Te Whanau a Te Harawaka |
|  MAC-01-07-07 Ngāi Taiwhakaea |  MAC-01-07-33 Tūhoe |
|  MAC-01-07-08 Ngāi Tama Haua (Hillier) |  MAC-01-07-34 Upokorehe Hapu (Te Whenua) |
|  MAC-01-07-09 Ngai Tamahaua Hapu (Herewini) |  MAC-01-07-35 Whakatohea Whanau Hapu and Iwi |
|  MAC-01-07-10 Ngāi Tama Haua hapū (Wordsworth Hillier) |  MAC-01-07-36 Whanau a Apanui Hapu |
|  MAC-01-07-11 Ngati Awa (Simpson) |  MAC-01-07-37 Whitianga Trust |
|  MAC-01-07-14 Ngāti Hokopū/Te Wharepaia |  MAC-01-07-38 Wikaire Whanau Trust |
|  MAC-01-07-15 Ngāti Ira o Waioweka |  MAC-01-07-39 Te Whanau a Tuwhahiwa-Ngati Paeakau |

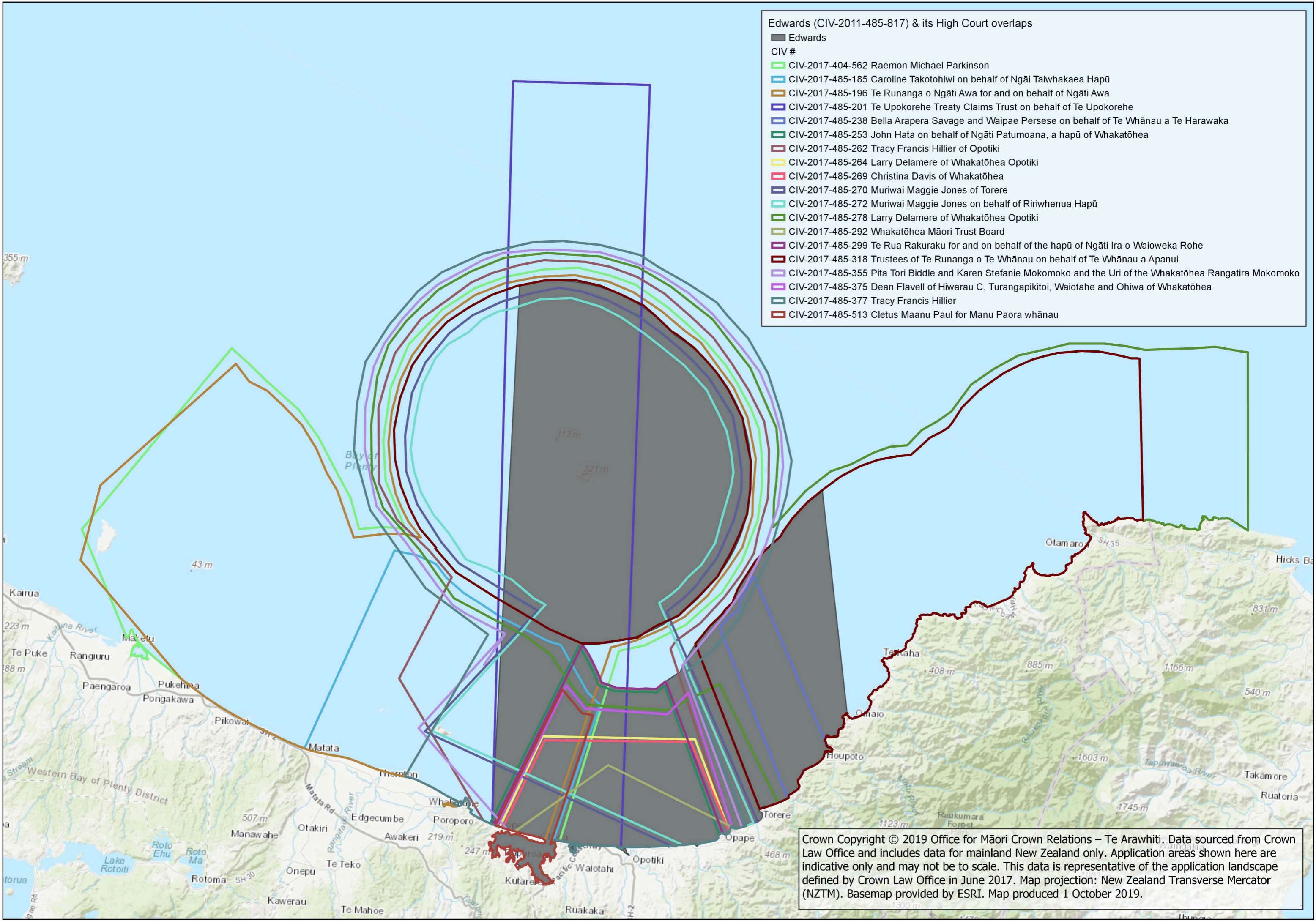
MAC-01-07-09 also has an application for protected customary rights which extends from Whakatane to Cape Kidnappers.



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Edwards (CIV-2011-485-817) & its High Court overlaps

- Edwards
- CIV #
- CIV-2017-404-562 Raemon Michael Parkinson
- CIV-2017-485-185 Caroline Takotohiwi on behalf of Ngāi Taiwhakaea Hapū
- CIV-2017-485-196 Te Runanga o Ngāti Awa for and on behalf of Ngāti Awa
- CIV-2017-485-201 Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe
- CIV-2017-485-238 Bella Arapera Savage and Waipae Persese on behalf of Te Whānau a Te Harawaka
- CIV-2017-485-253 John Hata on behalf of Ngāti Patumoana, a hapū of Whakatōhea
- CIV-2017-485-262 Tracy Francis Hillier of Opotiki
- CIV-2017-485-264 Larry Delamere of Whakatōhea Opotiki
- CIV-2017-485-269 Christina Davis of Whakatōhea
- CIV-2017-485-270 Muriwai Maggie Jones of Torere
- CIV-2017-485-272 Muriwai Maggie Jones on behalf of Ririwhenua Hapū
- CIV-2017-485-278 Larry Delamere of Whakatōhea Opotiki
- CIV-2017-485-292 Whakatōhea Māori Trust Board
- CIV-2017-485-299 Te Rua Rakuraku for and on behalf of the hapū of Ngāti Ira o Waioweka Rohe
- CIV-2017-485-318 Trustees of Te Runanga o Te Whānau on behalf of Te Whānau a Apanui
- CIV-2017-485-355 Pita Tori Biddle and Karen Stefanie Mokomoko and the Uri of the Whakatōhea Rangatira Mokomoko
- CIV-2017-485-375 Dean Flavell of Hiwarau C, Turangapikitoi, Waiotaha and Ohiwa of Whakatōhea
- CIV-2017-485-377 Tracy Francis Hillier
- CIV-2017-485-513 Cletus Maanu Paul for Manu Paora whānau



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Cabinet Māori Crown Relations: Te Arawhiti Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Takutai Moana Financial Assistance: Additional Funding

Portfolio Treaty of Waitangi Negotiations

On 3 December 2019, the Cabinet Māori Crown Relations: Te Arawhiti Committee (MCR):

- 1 **noted** that in March 2012, the previous government agreed to the development of the Takutai Moana financial assistance scheme (the scheme) for applicant groups to progress their applications under the Marine and Coastal Area (Takutai Moana) Act 2011 [TOW Min (12) 1/1];
- 2 **noted** that additional funding is sought for 42 applicant groups in the High Court hearing of the *Edwards* application [CIV-2011-485-817] (the *Edwards* hearing) as the scheme's funding does not extend to the preparation and attendance by legal counsel for a 40-day hearing, and that funding should be provided now as preparatory work by the groups is well underway;
- 3 **agreed** to the Minister of Finance and the Minister for Treaty of Waitangi Negotiations providing an additional \$6.372 million from the scheme, over 2019/20 and 2020/21, to the 42 groups appearing in the *Edwards* hearing, which will start on 17 August 2020 and is scheduled for eight weeks;
- 4 **noted** that increased funding is sought in the scheme for every applicant group in the High Court to attend interlocutory hearings as the current level of funding is insufficient, but the increase proposed is small with the view to cover applicant groups until the comprehensive review of the scheme has been completed;
- 5 **agreed** to the Minister of Finance and the Minister for Treaty for Waitangi Negotiations increasing the amount of funding available in the Takutai Moana financial assistance scheme for all applicant groups in the High Court by \$7,950 for interlocutory hearings which will cost the scheme \$3.218 million over 2019/20 to 2023/24;

6 **approved** the following changes to appropriations to give effect to the policy decisions in paragraphs 3 and 5 above, with a corresponding impact on the operating balance and net core Crown debt:

Vote Treaty Negotiations Minister for Treaty of Waitangi Negotiations	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24
Non-Departmental Other Expenses: Contribution Toward Determining Customary Interests in the Marine and Coastal Area (M74)	-	-	-	0.214	8.557

7 **s 9(2)(f)(iv)** [REDACTED];

8 **noted** that a comprehensive review of the Takutai Moana financial assistance scheme is set to be completed by mid-2020;

9 **invited** the Minister for Treaty of Waitangi Negotiations to report back to MCR following the review of the Takutai Moana financial assistance scheme.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis (Chair)
Hon Grant Robertson
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Damien O'Connor
Hon Shane Jones
Hon Peeni Henare

Officials present from:

Office of the Prime Minister
Officials Committee for CMR

Hard-copy distribution:

Minister for Treaty of Waitangi Negotiations