



Office of Hon Kate Wilkinson

Minister of Conservation
Minister of Labour
Minister for Food Safety

Associate Minister of Immigration

20 August 2010

Brian and Kathleen Reid
President and Secretary
Akaroa Harbour Marine Protection Society
(b.kreid@xtra.co.nz)

Dear Brian and Kathleen

Proposed Akaroa Marine Reserve

Application

1. In 1996 the Akaroa Harbour Marine Protection Society made an application for an Order in Counsel to establish a marine reserve under the Marine Reserves Act 1971 in the vicinity of Dan Rogers Bluff, Akaroa Harbour.
2. The application has been objected to by a number of persons and organisations. The objections cover each of the grounds set out in section 5(6) of the Marine Reserves Act.

Decision

3. Before considering the application I am required to decide whether or not to uphold any objections. In so doing I am required to take into account any answers made to the objections by your Society.
4. Having considered all of the objections and the answers to them I have decided to uphold the objections on the basis that I am satisfied that declaring the area to be a marine reserve will interfere unduly with or adversely affect the existing usage of the area for recreational purposes.
5. The consequence of my decision to uphold the objection on this ground is that the area will not be declared to be a marine reserve.
6. I appreciate that my decision is not the one you were wanting and that it will be a disappointment to you after so many years of effort on your part. I do commend you for the work that you have put into raising the profile of the proposed marine reserve area in particular and Akaroa Harbour more generally.

Background

7. Following its lodgement, the application was put on hold pending the investigation into and the declaration of the Pohatu Marine Reserve at Flea Bay and the investigation into and establishment of a taiapure – local fishery in Akaroa Harbour (excluding the area of the proposed marine reserve).

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8. In 2006, the Department resumed the statutory process for the marine reserve application. Later that year, the then Minister of Conservation met with principal stakeholders. The Minister instructed the Department to undertake a second consultation process and to gather updated information from those affected by the application in light of the time that had elapsed since the application was first notified.
9. On 8 August 2009, the then Minister of Conservation met with a number of members of your society and with Ngai Tahu. I met with members of your society and with Ngai Tahu on 18 June 2010.
10. It is regrettable that there has been so long a delay between the filing of the application and my decision; and it has not been helped by the number of Ministers, by my count at least 6, who have had to deal with this matter.

Legislative process

11. The procedure of establishing a marine reserve is set out in section 5 of the Marine Reserves Act 1971. Following an application and public notification, all persons wishing to object to the making of an Order in Council declaring a marine reserve must provide their objections in writing and the reason for them. The applicant then has an opportunity to respond to them following which the Director-General of Conservation refers to the Minister the objections and any answers received from the applicant.
12. Before considering the application, section 5(6) of the Act requires me to decide whether or not to uphold any objection and, in so doing, to take into consideration the applicant's answer to the objections. If I uphold an objection, that is the end of the process and the application for the marine reserve is not able to proceed further. If I decide not to uphold any objections, and I am of the view that to declare the area to be a marine reserve will be in the best interests of scientific study, and will be for the benefit of the public, and it is expedient that the area should be declared to be a marine reserve, I am required to seek the concurrence of the Ministers of Fisheries and Transport before making a recommendation to the Governor-General.
13. Although I am not considering the grant of the application at this stage I have, in making my decision, considered the objections made against it, the applicant's answers to those objections, all of the information provided in respect of the application, and the report provided by my Department which analyses all of this information.
14. In making my decision under section 5(6) I must uphold an objection if I am satisfied that declaring the marine reserve would:
 - (a) Interfere unduly with any estate or interest in land in or adjoining the proposed reserve;
 - (b) Interfere unduly with any existing right of navigation;
 - (c) Interfere unduly with commercial fishing;
 - (d) Interfere unduly with or adversely affect any existing usage of the area for recreational purposes; and
 - (e) Otherwise be contrary to the public interest

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15. I must therefore consider each ground in turn.

(a) Adjacent Land Owners

16. I have considered the objections under this head and the applicant's answers. I am satisfied that there are practical solutions to meet concerns about vehicle and access management; and while there may be a loss of fishing opportunity at Haylocks Bay, access to that bay is through the Akaroa Heads Scenic Reserve rather than private land.

17. I am also satisfied that the proposed marine reserve compliance is a matter for the Department, rather than adjacent land owners and any policing of the marine reserve would occur mostly through the use of boats. The right of public access provided for in the Foreshore and Seabed Act 2004 exists whether or not there is a marine reserve.

18. I do not consider the proposed marine reserve will interfere unduly with any estate or interest in land in or adjoining the proposed reserve. Accordingly, I do not see any reason to uphold any of the objections on this ground.

(b) Navigation

19. I have considered all of the objections under this head. They covered a number of concerns including freedom of lawful transit and shelter by vessels (whether fishing vessels or otherwise and whether carrying fishing gear and fish or not), the use of buoys and beacons, and closure of the area to navigation for scientific study.

20. As the applicant has noted, section 23 of the Marine Reserves Act preserves the right of passage through and shelter in a marine reserve whether by a fishing vessel or other vessel and whether carrying fishing gear and fish or not. The applicant has also noted that it is not necessary to close off part or all of a marine reserve to navigation to enable the carrying out of scientific study.

21. I do not consider that the concern about compliance surveillance checks is a significant issue. Where there are laws to comply with it is the duty of citizens to comply with them and surveillance checks are a legitimate means of ascertaining compliance. I do not see this as an undue interference with navigation.

22. I am satisfied that the applicant's answers address the balance of the objections. I do not consider that declaring a marine reserve would interfere unduly with any existing rights of navigation.

23. Accordingly, I do not uphold the objections relating to navigation.

(c) Commercial Fishing

24. The bulk of the objections under this head simply claimed undue interference without further elaboration. Where further detail was provided the grounds related, in large part, to the loss of the ability to lay crayfish pots; concern that fishing vessels may have to take a different route into the harbour; the lack of justification for the selection of the site; the lack of overall

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management of the harbour; and a concern that the creation of the proposed marine reserve would put pressure on commercial fishers as it would impact on their ability to spread effort more evenly throughout the area.

25. The applicant expressed the view that Akaroa crayfishers traditionally operate over some 50km of coastline of which the proposed marine reserve occupies just 1.5km; contended that any adjustment to crayfishing would be minimal as suitable habitat exists all along the coast; and noted that the justification for selecting the marine reserve site is contained in the application. With respect to the concerns of paua fishers, the applicant calculated that only 0.7% of the TACC for PAU 3 comes from the proposed marine reserve.
26. I accept that the establishment of the proposed marine reserve will require the relocation of fishing effort to alternative fishing grounds. This affects paua and rock lobster in particular. Nevertheless, I am satisfied that there will only be a minor amount of displacement of fishing effort if the marine reserve were to be established. The High Court¹ has provided guidance on the meaning of undue in the context of this provision in the Marine Reserves Act. It is not limited to "excessive" in a quantitative sense; but incorporates "unjustified" in a quantitative sense.
27. Having considered all matters, it is my view that the interference of a marine reserve with commercial fishing is warranted in this instance and that it is not undue either in a quantitative sense (the proposed marine reserve is a small fraction of the greater area where paua and rock lobster in particular are taken from and the marine reserve offers a good lobster habitat) or qualitative (the interference is justified and not improper).
28. Accordingly, I do not uphold the objections relating to commercial fishing.

(d) Recreational Purposes

29. Most of the objections made against the proposed marine reserve occurred under this head. Some objectors were under the impression that the entire harbour would be closed off to fishing; others wished to retain the opportunity to fish in the proposed marine reserve; others noted the shelter that the area provided to fishers in small boats from prevailing winds. There was a concern that the proposed marine reserve would adversely affect fishing activity from boats; concern about the reserve's effect on economic issues; and some concerns about the cumulative loss of recreational fishing spots in and around the area.
30. The applicant noted that fish commonly caught in the proposed marine reserve were caught elsewhere in the harbour and that recreational fishing was therefore able to be undertaken elsewhere; that most recreational fishing takes place in summer time when the weather is usually settled and that, in any event, good fishing could be had early morning and late afternoon when there was not likely to be any wind; that a much greater number of people come to the harbour for its wildlife and scenery; that there is likely to be an increase in the recreational use of the area as a result of a new marine reserve; and that economic benefits can accrue in marine

¹ *CRA3 Association Industry Incorp v Ministers of Fisheries and Conservation* CP 317/99, Wellington, McGechan J, 29 May 2000

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reserves.

31. I must be satisfied in overall terms that there will not be undue interference with or any adverse effect on the existing recreational usage of the area proposed for the marine reserve. To the extent that the application, if granted, would diminish existing use for a particular recreational purpose, qualitatively or quantitatively, that will prima facie be an adverse effect or an undue interference. If, however, I am satisfied that enhancement of other existing recreational uses will occur and will outweigh the detriments to existing use for recreational purposes then I could conclude that there is no adverse effect and that the interference is not undue.
32. Current recreational usage is fishing and nature tourism and the latter is primarily focussed on the scenic values of the land and sea interface. It would seem that diving, snorkelling, and underwater photography are inherently limited because of sea conditions and poor underwater visibility. If they currently occur, which is unclear, there does not appear to be any real likelihood of enhancement of those activities.
33. There is a suggestion that nature tourism will increase if there is to be a marine reserve and some reliance has been placed on the general increases in visitor numbers following the establishment of marine reserves in other parties of the country (although surveys are limited).
34. While it is possible that there will be some enhancement of nature tourism as a result of the marine reserve, the degree of that enhancement is unclear. In any event I am not satisfied that it will outweigh the detriment to recreational fishers no longer being able to fish in the area. In short, I consider that declaring a marine reserve would interfere unduly with or adversely affect the existing usage of the area for recreational purposes.
35. Accordingly, I uphold the objections based on this ground.

(e) Public Interest

36. I have considered the original objections made in 1996. Many of them raised matters that have already been considered and rejected under the head of navigation. The more recent objections in 2006 focused on science, research and management and process issues.
37. I have also considered the applicant's answers to the objections and am satisfied that they are an adequate response to the objections on this part of the public interest ground and I do not, therefore, uphold them.
38. There were also more particular objections linked to such issues as customary fishing, customary management and Treaty principles. These covered a range of issues including that the establishment of the proposed marine reserve would unduly interfere with current and future resources being gathered; that the area is important for cultural and spiritual reasons; the effect on customary fishing; and customary management issues that related to alleged breaches of existing rights (such as a breach of the Ngai Tahu Claims Settlement Act 1998, and the effect of the Foreshore and Seabed Act 2004), Treaty principles and conflict with the management of the taia pure. In addition there was a request that if a marine reserve is established the option of customary use be considered.

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39. The applicant acknowledges the special significance of the harbour to tangata whenua but relied on the Taiapure Tribunal's report that the mana and rangatiratanga of Ngai Tahu Whanui could be amply and properly expressed in the designation of a taiapure in the balance of the harbour; that if the proposed marine reserve is compromised by allowing customary take, the community buy-in to the taiapure would be reduced; and that the Taiapure Tribunal found that the public interest requires a marine reserve rather than a taiapure.
40. First, I do not accept that the proposed marine reserve will breach the Ngai Tahu Claims Settlement Act in the sense of leading to a loss of access to traditional mahinga kai. The area is not covered in Parts 11 or 12 of the Act. Nor does the Foreshore and Seabed Act prevent a protected status such as that afforded by a marine reserve being put in place.
41. Next, it is necessary for me to weigh up the benefits of the proposed marine reserve against the detrimental effects on customary and Treaty issues. In so doing, I need also to consider whether any detriment can be mitigated by, for example, allowing customary fishing to occur if the marine reserve is declared. If I consider that the detrimental effects on these issues outweigh the benefits of the proposed marine reserve, I must uphold the objections. If I consider the benefits of the proposed marine reserve outweigh the detrimental effects on customary and Treaty issues (with or without mitigation measures) I should not uphold objections.
42. The detrimental effects of the proposed marine reserve on customary and Treaty issues are that: pollution and overfishing in other parts of the harbour limit the areas where customary fishing can occur; and that tangata tiaki/kaitiaki will not be able to exercise customary rights in the proposed marine reserve if it is a no-take marine reserve.
43. Countervailing benefits that the proposed marine reserve may have include the fact that Akaroa Harbour is in a degraded ecological state which makes it highly desirable for a conservation zone to be established in the harbour so that it is protected from fishing and other exploitation in the long term; that the prevailing scientific view is that the proposed marine reserve would offer a good benchmark against which the success of measures implemented in the balance of the harbour may be assessed; that the proposed marine reserve would more effectively ensure ongoing protection of marine diversity in the harbour; that a marine reserve and taiapure operating side by side would be complementary; that a no-take marine reserve is likely to enhance fish stocks in the areas immediately adjacent to the reserve; the fact that the marine reserve comprises only 8% of the taiapure area; and the possibility that tangata whenua could be invited to participate in some sort of management role for the marine reserve if established.
44. Other benefits that would result in declaring the proposed marine reserve include the fact that the area has features of distinctive quality as well as features that are typical; that it contains a unique type of seaweed; that a marine reserve would more effectively ensure ongoing protection of marine diversity in the area and provide replenishment of feeding grounds in adjacent areas; and that a marine reserve is a reliable preservation and protection tool.

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45. The findings of the Taiapure Tribunal are, of course, not binding on me but I note its view that the mana and rangatiratanga of the runaka and constituent hapu could be amply and properly expressed in the designation of a taiapure in the balance of the harbour (excluding the marine reserve). The designation of that taiapure has, of course, since occurred.
46. Having weighed the detrimental effects of the proposed marine reserve on customary and Treaty issues against the benefits of the proposed reserve, I am of the view that the benefits (referred to in paragraph 43 & 44) outweigh the detriments (referred to in paragraph 42). As well, I am not satisfied that allowing customary fishing to occur in the reserve or making a boundary adjustment to exclude identified cultural and customary fishing areas of significance from the proposed marine reserve would tip the scales sufficiently far for me to reach a different view. I would, however, seek the views of tangata whenua on the appropriate name for the marine reserve if established; and invite tangata whenua to be represented on any marine reserve advisory committee.
47. To conclude, I do not consider that declaring a marine reserve would otherwise be contrary to the public interest. Accordingly I do not uphold any objections on this ground.

Summary

48. I have not upheld the objections that declaring a marine reserve in the vicinity of Dan Rogers Bluff, Akaroa Harbour, would:
- (a) Interfere unduly with any estate or interest in land in or adjoining the proposed reserve;
 - (b) Interfere unduly with any existing right of navigation;
 - (c) Interfere unduly with commercial fishing;
 - (d) Otherwise be contrary to the public interest.
49. I have, however, upheld the objection that declaring the marine reserve would interfere with or adversely affect the existing usage of the area for recreational purposes. This has the consequence that the area is not able to be declared a marine reserve.

Yours sincerely



Hon Kate Wilkinson
Minister of Conservation