

# Departmental Memo



GS ref: 19 - B - 0897

DOCCM: 6135944

## In Confidence

**Date:** 27 November 2019  
**To:** Minister of Conservation  
**From:** Marie Long, Director Planning, Permissions and Land Unit  
**Subject:** **Key issues in relation to DOC and MPI joint advice on the Moutere Ihupuku/Campbell Island Marine Reserve Extension**

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### Purpose – Te Pūtake

1. This memo expands on the joint agency advice (briefing **19-B-0702**) concerning Ministers' decisions on the Moutere Ihupuku/Campbell Island Marine Reserve extension (the decision).

### Background and context – Te Horopaki

2. On 4 March 2019, you received the recommendation report of the independent review of Moutere Ihupuku / Campbell Island marine reserve and Additional Area (the marine reserve) (refer **18-B-1452**).
3. You provided the report to the Minister of Fisheries for his consideration, pursuant to the statutory 90-day timeframe set out by the Subantarctic Marine Reserves Act 2014 (the Act).
4. The Minister of Fisheries responded noting further work was required to understand concerns raised by Ngāi Tahu (refer **MPI- B19-0318**).
5. You and the Minister of Fisheries now have to jointly decide whether or not to extend the marine reserve.
6. DOC and MPI have provided you with joint agency advice (agency advice) to support your decision-making (**19-B-0702**). The agency advice is attached to this memo.
7. This memo expands on key issues in the agency advice, including:
  - 1) The importance of understanding Ngāi Tahu's views;
  - 2) The Envirostrat technical review findings and recommendation are relevant; considerations; and
  - 3) The precedent effect of this decision on future marine protection.
8. Further commentary on why DOC is not making a recommendation is also provided.

### Issue One: The importance of understanding Ngāi Tahu's views

9. DOC's view is that alternative protection, particularly a marine reserve, will likely be opposed by our Treaty Partner given the views outlined in the agency advice and accompanying appendices (refer 19-B-0702, paras 35 (e), 36 (b)&(c)) and appendices two and three).

10. 9(2)(h) [REDACTED].<sup>1</sup>
11. Treaty principles require the following. Firstly, decision-makers need to be informed about Ngāi Tahu's interests.<sup>2</sup> A summary of Ngāi Tahu's interests (9(2)(h) [REDACTED]) is provided in Appendix Three of the agency advice (refer 19-B-0702). It is important that you consider this information.
12. 9(2)(h) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## **Issue Two: The Envirostrat technical review findings and recommendation are relevant considerations**

13. The key findings of the Technical Review commissioned by Envirostrat, are summarised in Appendix one of the briefing (19-B-0702).
14. Key points from these findings include:
- a) No fishing activity has occurred in the Additional Area since the enactment of the Subantarctic Islands Marine Reserves Act in 2014.
  - b) It is unlikely that the Additional Area alone could sustain a commercially and biologically viable target fishery for giant spider crab (or other commercial fisheries of value).
  - c) The biodiversity value of the Additional Area is very high.
15. Agencies consider that the Technical Findings are accurate. The reviewer, while acknowledging and describing several constraints, determined there was enough information to make a recommendation to extend the marine reserve.
16. Agencies also consider the legislative requirements of the review have been met.

## **Issue Three: The precedent effect of this decision on future marine protection**

### *Relying on threats to justify protection*

17. DOC is concerned that relying on the lack of immediate threats<sup>4</sup> to the Additional Area as a reason not to extend is inconsistent with our current practice and may create a precedent that reserve status should only be considered where there is an appropriate level of threat.
18. International best practice, scientific guidance, and New Zealand's Marine Protected Areas Policy (MPA policy) state that while a threats analysis can usefully inform the design and subsequent management of protected areas, marine protected areas (MPAs) are principally a protection tool and not a threat management tool. High quality sites such as the Additional Area not under threat may also be a priority for marine reserve status.

### *Current and future use*

19. The Act requires consideration to be given to potential future uses by requiring consideration of a potential deepwater crab fishery. Ngāi Tahu have also asked officials

<sup>1</sup> Letter from Rosemary Dixon to Aimee Paterson and Jonty Somers, "Advice regarding extension to Marine Reserve under the Sub-Antarctic Islands Marine Reserves Act 2015", 21 November 2019 at [58].

<sup>2</sup> Ibid at [78].

<sup>3</sup> Ibid at [10].

<sup>4</sup> A lack of immediate threats is part of a cost/benefit approach to establishing marine reserves.

to consider future uses of the Additional Area by considering the effect of climate change on fisheries.

20. The Marine Reserves Act 1971 and MPA policy do not require consideration of future uses. A requirement to consider future uses would likely result in a decision not to establish a marine reserve. DOC notes that, despite the bespoke legislative process in this case, an expectation may be created that future uses are a relevant or mandatory consideration when establishing marine reserves.

#### *The level of data required*

21. Finally, DOC officials are concerned about the impact this decision may have on the level of data or information required to establish or extend marine reserves.
22. While recognising the Act sets particular information requirements, a decision to not extend the marine reserve on the basis of lack of information, or a decision to extend that is overturned by the Court on the basis of a lack of information, may have impacts for the future establishment of marine reserves.
23. It may be more challenging to establish marine reserves in future if a lack of information is relied on as a reason not to extend in this case. Undertaking surveys to fully understand aspects such as potential future value or use is likely to be logistically challenging and cost prohibitive for many areas.

#### **Further commentary on why DOC is not making a recommendation**

24. In the agency advice (refer 19-B-0702, para 10) we note the reasons why we are not making a recommendation. This includes outlining advice from DOC officials who worked on the Subantarctic Island Marine Reserves Bill regarding the intent behind the review clause. They are clear the onus was on the industry to provide evidence of a viable fishery, and if evidence was not produced then the area would become a marine reserve.
25. DOC officials consider this understanding reflects the significant amount of work that was undertaken as part of the Stakeholder Forum 2008-2010 which recommended, as one of two options, a full marine reserve, and the strong support for this option by Ngāi Tahu, scientific and ENGO interests at the time. A decision not to extend undermines this prior understanding and work and forgoes an opportunity to achieve significant conservation benefits in the marine space.
26. However, it has become apparent during the independent review that Ngāi Tahu no longer support a full marine reserve. <sup>9(2)(h)</sup>  
[REDACTED]  
[REDACTED]  
[REDACTED] a decision to extend the marine reserve in the face of our Treaty Partner's objections may damage the Crown's relationship with Ngāi Tahu, and may have implications for other marine work, as noted above.
27. DOC has a function under section 6 of the Conservation Act 1987 to advocate for the conservation of natural and historic resources generally. DOC also has the obligation in section 4 to give effect to the principles of the Treaty of Waitangi. Given the constraints and timeframes provided by the Act, officials have found reconciling these two directives incredibly difficult. We have therefore decided to provide you with all the relevant information and to allow Ministers to decide based on their priorities.

#### **Next steps – F**

28. There is a joint Ministers' meeting with officials on 4 December 2019 to discuss the advice contained in the agency advice (19-B-0702).
29. Officials have requested your decisions on the agency advice recommendations by 13 December 2019.

30. If you require further advice on the issues raised in this memo, officials are available to meet with you in advance of the joint Ministers meeting.

Contact for queries:

Marie Long, Director Planning, Permissions and Land, Department of Conservation. Mobile: 9(2)(a) .

**ENDS**

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Proactive release