He tono nä

Te Rünanga o Ngäi Tahu

ki

Minister of Conservation

e pä ana ki te

Akaroa Harbour (Dan Rogers) Marine Reserve Proposal

June 2006

Te Rünanga o Ngäi Tahu

This submission is made on behalf of Te Rünanga. Te Rünanga is the tribal representative body of Ngäi Tahu Whänui, a body corporate established on 24 April 1996 under section 6 of the Te Rünanga o Ngäi Tahu Act 1996 ("the Act").

Section 3 of the Act states:

> *"This Act binds the Crown and every person (including any body politic or corporate) whose rights are affected by any provisions of this Act."*

Section 15 of the Act states:

"(1) Te Rünanga o Ngäi Tahu shall be recognised for all purposes as the representative of Ngäi Tahu Whänui

"(2) Where any enactment requires consultation with any iwi or with any iwi authority, that consultation shall, with respect to matters affecting Ngäi Tahu Whänui, be held with Te Rünanga o Ngäi Tahu."

"(3) Te Rünanga o Ngäi Tahu, in carrying out consultation under subsection (2) of this section, –

(a) shall seek the views of such Papatipu Rünanga of Ngäi Tahu Whänui and such hapü as in the opinion of Te Rünanga o Ngäi Tahu may have views that they wish to express in relation to the matter about which Te Rünanga o Ngäi Tahu is being consulted; and

(b) shall have regard, among other things, to any views obtained by Te Rünanga o Ngäi Tahu under paragraph (a) of this subsection; and

(c) Shall not act or agree to act in a manner that prejudices or discriminates against, any Papatipu Rünanga of Ngäi Tahu or any hapü unless Te Rünanga o Ngäi Tau believes on reasonable grounds that the best interests of Ngäi Tahu Whänui as a whole require Te Rünanga o Ngäi Tahu to act in that manner."

On 21 November 1997, Te Rünanga and Her Majesty the Queen executed a Deed of Settlement, whereby the Crown undertook to provide redress for all of Ngäi Tahu Whänui's historical claims (the "Deed of Settlement"). The Ngäi Tahu Claims Settlement Act 1998 (the "Settlement Act") provided for those aspects of the Deed of Settlement that required legislative effect.

Te Rünanga by virtue of its statutorily recognised position as the representative tribal body of Ngäi Tahu Whänui makes this submission on behalf of the Ngäi Tahu tribal collective.

Attention is respectfully drawn to the special status of Te Rünanga. Te Rünanga notes that this submission should not be treated as a single submission but should be accorded the status and weight due to the tribal collective, Ngäi Tahu Whänui, which it represents.

There are currently over 35,000 members of Ngäi Tahu Whänui whose names are registered on the role in accordance with section 8 of the Act, and this number continues to grow. The 2001 census shows that there are over 39,000 Mäori who claim Ngäi Tahu whakapapa.

Notwithstanding its statutory status as the representative voice of Ngäi Tahu Whänui "for all purposes", Te Rünanga accepts and respects the right of individuals and Papatipu Rünanga to make their own comments in relation to this matter.

Te Rūnanga o Ngāi Tahu submits in support of the submissions lodged by Te Rūnanga o Koukourārata, Te Rūnanga o Ōnuku and Wairewa Rūnanga. It particularly draws attention to the impact on the local hapū that a marine reserve would cause, which is clearly outlined in the submission from Wairewa Rūnanga.

Te Rūnanga o Ngāi Tahu also submits in support of the submission by Option 4 and agrees with the points made in that submission.

Opposition to Akaroa Harbour (Dan Rogers) Marine Reserve Proposal

Te Rūnanga o Ngāi Tahu submits in opposition to the creation of the Akaroa Harbour (Dan Rogers) Marine Reserve Proposal. There are two key reasons for this opposition:

1) the old process of selecting sites for potential marine reserves is flawed, and as such undermines the new Marine Protected Areas Policy. The selection of the Dan Rogers site is opposed and is evidence of this flawed approach.

2) the creation of a marine reserve at the Dan Rogers site in the Akaroa Harbour would not constitute active protection of customary rights, as is required by section 4 of the Conservation Act 1987.

1) Selection of Dan Rogers site

Te Rūnanga o Ngāi Tahu and others opposition to the Dan Rogers site is an indicator that the marine reserve was selected using an inappropriate process. The process of accepting applications from certain sectors of the community in the absence of an overview of the marine values across the marine area is random, ad hoc and fragmented, as is acknowledged by the new Marine Protected Areas Policy (MPA Policy). When there is substantial opposition from key parts of the community to the area selected, this is added cause for concern.

The Dan Rogers proposal is a good example of this old approach to site selection, and was a key cause for Te Rūnanga o Ngāi Tahu opposition to marine reserves in principle. As a result of this opposition to marine reserves, but in an attempt by Te

Rūnanga o Ngāi Tahu to move forward to address the concerns about the ad hoc approach to the selection of marine reserves, the Department's Southern Regional Office, with Ngāi Tahu support and endorsement, convened an expert group in 2003. Coastal unit information from the Nearshore Marine Classification and Inventory was used to develop a report on the biodiversity values of the South Island (*Department of Conservation, 2004: Marine Biodiversity Expert Group Report. Completed as part of the Marine Protection Process for the Ngai Tahu Whanui Takiwa. Department of Conservation*). The aim of gathering this information was to work towards a transparent, systematic and scientifically robust method for determining sites that may require marine protection. After gathering the information, the next step was to work with Ngāi Tahu and the community to select the best sites for protection based on ecological values, while trying to avoid any significant clashes with community interests. The fact that the Department has now taken this approach across the whole marine environment through its MPA Policy is comfort to Te Rūnanga o Ngāi Tahu that a far more logical and integrated way forward for selecting sites for marine protection (including marine reserves) will be used in future site selection.

We are confident that if the MPA Policy was already in place, the selection of the Dan Rogers site as a marine reserve would have been highly unlikely. This is for a number of reasons:

- there is already another marine reserve in very close proximity
- there is another protection mechanism already in place (the Akaroa Taiāpure) which is able to protect the ecological values present at the site
- there is strong opposition from Tangata Whenua due to the traditional values of the area for customary fishing purposes
- it is highly likely there are other more appropriate sites within the Biogeographical Region that are representative of the values contained within the Dan Rogers site, should a marine reserve be considered the best way to protect these kinds of values

In other words, a more robust and transparent process, as is envisaged by the MPA Policy, would not have led to a recommendation for a marine reserve at the Dan Rogers site.

The consent of the Minister to the Dan Rogers marine reserve proposal would seriously undermine Ngāi Tahu and others support for the Marine Protected Areas Policy within the Ngāi Tahu takiwā.

It is further submitted that the Akaroa Taiāpure, which due to its recent gazettal has not yet had a chance to "prove" itself to the community, is a protection mechanism that is able to protect the values present at the site. The Taiāpure would be extended over the current Dan Rogers site should the marine reserve proposal be turned down. There is concern that the workability of the Taiāpure area will be undermined without the Dan Rogers site included, as the vast majority of the Taiāpure area is severely

depleted of fish or polluted. The Dan Rogers site therefore becomes key to the successful functioning of the Taiāpure.

2) Protection of customary rights

It is the Department's responsibility to give effect to the principles of the Treaty of Waitangi (section 4 Conservation Act 1987). One of those principles is the principle of active protection. This includes the active protection of customary fishing rights.

The Māori Land Court found that the entire area applied for as a Taiāpure, which includes the Dan Rogers site, is an area of special significance to the Tangata Whenua as a source of food and for spiritual and cultural reasons. Preventing customary fishing by imposing a marine reserve on a traditional fishing ground would be failing to actively protect customary fishing rights as required by the legislation.

Section 5(6)(e) of the Marine Reserves Act 1971 states that the Minister must uphold an objection if the Minister is satisfied that declaring the marine reserve would be contrary to the public interest. The effect of a marine reserve on customary fishing rights falls within this consideration. Our legal opinion (see attached) considers that a relevant aspect of the public interest is the Crown giving effect to the principles of the Treaty. Does the public interest *require* a reserve rather than a Mataitai or Taiāpure? It is noted that the Taiāpure/Mataitai, rahui and associated regulations are able to conserve resources in the area without the need for a marine reserve. To give effect to the Treaty principles, the Minister needs to show that the Dan Rogers area cannot be adequately protected by the Fisheries Act mechanisms for customary use and control, and that it is *crucial* to the functionality of the area that it becomes a marine reserve.

It is considered that the onus is on the proponents of the marine reserve to satisfy the Minister that the public interest *necessitates* the creation of a marine reserve, over an option that recognises customary use. The evidence would need to meet a high threshold given that both a Taiāpure and a Mataitai enables the management group to provide for a rahui over the area in question. A rahui or other Taiāpure mechanism could provide the protection and enhancement of the values that the Dan Rogers applicants are concerned about. The great advantage of the rahui mechanism in terms of active protection is that it addresses one of the key problems with the marine reserve tool, the permanent "lock up" of an area. Such a permanent "lock up" does not allow tangata whenua to adequately protect customary rights for future generations, thus undermining their role as kaitiaki.

In addition, overriding the Taiāpure by excluding tangata whenua from fishing customarily within the Dan Rogers area through the establishment of a marine reserve would adversely affect the ability of the provisions of the Fisheries Act to recognise and provide for customary non-commercial fishing. As such the Minister of Fisheries would not be exercising his powers and duties under the Fisheries Act in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

As outlined in the submissions of Wairewa Rūnanga, Ōnuku Rūnaka, and Te Rūnanga o Koukourārata, the area and extent of the proposed Dan Rogers marine reserve would have a significant effect on their customary fishing activities. By establishing a marine reserve in the Dan Rogers area, the hapū of Ōnuku and Wairewa Rūnanga in particular, would be forced to fish outside their rohe moana for decades until such time as the management measures put in place through the Taiāpure have restored the rest of the harbour to a fishable state. This is due to the depletion of stocks in Akaroa Harbour and the pollution within the harbour – both environmental conditions that the Taiāpure has been put in place to remedy. The workability of the Taiāpure will be seriously undermined if the Dan Rogers area is not included within it.

Please find attached our legal opinion, which forms part of this submission.

Due to the special status of Te Rūnanga o Ngāi Tahu and the Kaitiaki Rūnanga of the Akaroa Harbour, if the Minister is of the mind to not uphold the objections contained in this and associated submissions, we would like to request a meeting with the Minister prior to his decision, in particular to discuss his legal advice on our legal opinion attached.

Te Rūnanga o Ngāi Tahu and the Kaitiaki Rūnanga are also keen to meet with the Department to discuss in more detail the mechanisms available under the Fisheries legislation that would be used to protect the values present at the site, as discussed in our submission.

Any queries in respect of this submission should be addressed to:

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