

Legal Opinion

Subject: On the Case for designating Waiheke Island as a UNESCO Biosphere Reserve
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To: Prof. Klaus Bosselmann **Date:** 20 September 2010

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Introduction

As part of the new governance structure under the Auckland supercity, a new five-seat Waiheke Local Board will be elected on 9 October 2010. Currently there are around seventeen candidates vying for these seats. The issue of whether Waiheke should become a UNESCO biosphere reserve is becoming central to these elections. The idea was championed by Colin Beardon who now is standing as one of the candidates. Eight other candidates support the idea,¹ while others are not sure about its merits: some see it as an aspirational goal (Don Mckenzie), others worry about the bureaucratic/legislative (Andy Spence) or financial (Jo Holmes and Faye Storer) implications of such a framework, while others (Jim Hannan) argue that such a framework would be redundant given the protections under the Resource Management Act 1991 and the Gulf Marine Park Act 2000. There are also those who say (Herb Romaniuk) there is too much mystery around the UNESCO idea for it to be an election issue right now, and say the proposal should be developed away from the elections (Allen Davies).² This legal opinion clarifies said concerns re the issue of UNESCO biosphere reserves, and provides practical recommendations on the same.

¹ These are Eme Kilkenny, Graham Hooper, Paul Walden, Marijke Ransom, Denise Roche, Ewen Sutherland, Millie Watkins, and Dorte Wray.

² "Batting for a biosphere". Available at <http://www.stuff.co.nz/auckland/local-news/waiheke-marketplace/4059464/Batting-for-a-biosphere>. Accessed on 2010-09-04.

Background: Biosphere Reserves and the MAB Programme

What is the Man and the Biosphere (MAB) Program?

The framework of biosphere reserves comes under the rubric of the UNESCO's Man and the Biosphere Program (MAB). MAB originated from recommendations by the International Biological Programme (IBP) in the 1960s. The main concern was systemic *in-situ* protection of genetic resources. In 1968, the IBP recommendations were expanded by the UNESO to include endangered species, habitats and ecosystems. These concerns collectively gave birth to the concept of a biosphere. After this, an International Coordinating Council (ICC) was formed. The ICC emphasized that establishment of reserves was important to meet scientific, educational, cultural and recreational needs. This came to be known as the "biosphere reserve" project. Today, the ICC consists of 34 Member States (currently not including New Zealand) elected by UNESCO's biennial general conference. The ICC normally meets once every two years. Among other things, the ICC decides upon new biosphere reserves and takes note of recommendations on periodic review reports of existing biosphere reserves. There are also MAB National Committees that oversee MAB programs in their countries and report to the MAB Council. It is imperative to note that the MAB approach stresses the fact that conservation must not be the sole objective of resource management.³

What is a biosphere reserve?

The official definition of a biosphere reserve can be found in Article 1 of the Statutory Framework of the World Network.⁴ A biosphere reserve differs from a national park in having three very different, but equal, functions: (1) conservation of ecosystems; (2) scientific research and monitoring; and (3) promoting sustainable development in communities of the surrounding region. National parks and other kinds of protected natural areas usually are primarily concerned with conservation, and only secondarily with research and sustainable development.⁵

As of September 2010, there are 564 reserves in 109 countries.⁶ While New Zealand has a National MAB Committee (under the Department of Conservation), it does not have and never had any biosphere reserves. In comparison, Australia has 15; the earliest was designated in 1977 while the latest in 2009. The largest number of biosphere reserves can be found in the United States (47), Russia (41), and Spain (40).

There is no single model for the management of Biosphere Reserves, but there are two common underlying principles:

³ UNESCO *Use and Conservation of the Biosphere*. (UNESCO, Paris, 1968). 144. Cited in A. Gillespie *Protected Areas and International Environmental Law* (Martinus Nijhoff Publishers, Leiden, 2007). 13.

⁴ The Statutory Framework is available at <http://unesdoc.unesco.org/images/0010/001038/103849Eb.pdf> Accessed on 2010-09-01.

⁵ The George Wright Organization (2010) "The UNESCO Man and the Biosphere Program: What's It All About?" <http://www.georgewright.org/mab.html#Anchor-47857>. Accessed on 2010-08-27.

⁶ UNESCO *Biosphere Reserves World Network* (UNESCO, Paris, 2010) Available at <http://www.unesco.org/mab/doc/brs/BRList2010.pdf> Accessed on 2010-09-04.

- i. The management of a Biosphere Reserve needs to be community-based. This gives effect to what is known as participatory governance. Participatory governance is site-specific and dependent on both political culture and socio-economic development.⁷ It is associated with risks and opportunities when taking into account the various stages of socio-economic development.⁸ Biosphere reserves are meant to be places where communities can work in concert with the area's land-managing agencies, local governments, schools, and other institutions to design responses to external political, economic, and social pressures that affect the ecological and cultural values of the area. Under this principle, biosphere reserves can be seen as giving effect to a weak version of local autonomy. According to Pierre and Peters,⁹ participation (considered a prerequisite for a collaborative multi-stakeholder approach to biosphere reserve management) is based on policies characterised by decentralisation of control over sub-national governing bodies, which creates a pattern of multi-governance. Political objectives to be addressed by the state are then to be seen as a complex trade-off between different policy objectives of the societal groups involved.
- ii. Each reserve has its own governance system to ensure that it meets its functions and objectives. This can be in the form of a local board to coordinate all biosphere reserve's activities. Usually a coordinator is named as the contact person for all matters dealing with the biosphere reserve.

The above two principles could well explain why New Zealand has been shying away from establishing biosphere reserves for the last fifty years: they dictate a decentralized approach to governance, which is not in line with the current political thinking in New Zealand.

What is the difference between a biosphere reserve and a natural World Heritage site?

A biosphere reserve is a representative ecological area with 3 mutually reinforcing functions: conservation, sustainable development and logistic support for scientific research and education. Collectively, all biosphere reserves form a World Network linked by exchanges of experience and knowledge. They are part of a UNESCO scientific programme, governed by a "soft law", the Statutory Framework.

On the other hand, Natural World Heritage sites must be of outstanding universal value in accordance with the UNESCO Convention on the Protection of the World Cultural and Natural Heritage (1972). Efforts to enhance local development and to promote scientific understanding are means to ensure the protection of the natural World Heritage values.

⁷ P. Getimis and G. Kafkalas "Empirical evidence and comparative analysis of policy-making in the pursuit of innovation and sustainability" in H. Heinelt, P. Getimis, G. Kafkals, R. Smith, E. Swyngedouw (Eds.) *Participatory Governance in Multi-Level Context: Concepts and Experiences* (Leske + Budrich, Opladen, Germany, 2002).

⁸ T. O'Riordan and S. Stoll-Kleemann "Deliberative democracy and participatory Biodiversity" in T. O'Riordan and S. Stoll-Kleemann (Eds.) *Biodiversity, Sustainability and Human Communities: Protecting Beyond the Protected*. (Cambridge University Press, Cambridge, 2002) pp. 87–112.

⁹ J. Pierre and B.G. Peters *Governance, Politics and the State* (MacMillan Press Ltd., Houndmills, Basingstoke, Hampshire and London, UK, 2000).

In some instances, a core area of a biosphere reserve can meet World Heritage criteria: the usually larger biosphere reserve can therefore serve as a complementary means to protect the integrity of the World Heritage site.

New Zealand Involvement in the MAB Programme

As part of the member states in the UNESCO, New Zealand had been involved with the MAB programme since its inception. New Zealand was also active in identifying how the MAB programme can ameliorate the municipal law on conservation. In November 1977 a UNESCO Regional workshop was held in Australia and New Zealand to establish techniques for selection of biosphere reserves. This workshop formed part of the Biosphere (MAB) Project 8 of the UNESCO and was attended by other countries in the Asia and Oceania region. The result of the workshop included the following observations:¹⁰

- 1) The addition of the biosphere reserves goals to those already existing (under New Zealand legislation) *should not be allowed to diminish in any way our national effort* at nature conservation (emphasis added).
- 2) The inclusion of man-modified ecosystems in conjunction with natural ecosystems will warrant sustained dedication of such man-modified systems for research and monitoring. “This may require land reservation and land management in ways related to but different from the ways already provided for under reserves legislation [Reserves Act 1977]”.
- 3) The summary criteria for selection of natural areas for the biosphere reserves programme, namely, representativeness, diversity, naturalness, effectiveness as a conservation unit and international significance, demand urgent assessment of New Zealand natural reserves if New Zealand is to take any national part in this international project. “Above all, the representativeness criterion will demand that we dedicate an interdisciplinary task force to accept, modify or develop a system of ecosystem classification appropriate to New Zealand, to apply such a classification system to the natural resources of this country, and to assess existing reserves and potential reserves by such an ecosystem classification against other Biosphere Reserve criteria.”¹¹

Although NZ was clearly involved with the initial discussions over biosphere reserves, the evidence is that none have ever been created here.

There is certainly no specific NZ legislation relating to them. However, there the Reserves Act 1977, which seems to cover reserves, in general, is administered by the Dept of Conservation.

Legal and Financial Obligations Arising from a Biosphere Reserve

¹⁰ K.F. O’Connor and B.P.J. Molloy “Biosphere Reserves for New Zealand” in *MAB Prospects for New Zealand Biosphere Reserves* B.T. Robertson, K.F. O’Connor and B.P.J. Molloy (eds) New Zealand Man & the Biosphere Report No. 2 1979. (Tussock Grasslands and Mountain Lands Institute, 1977) 3 at 6.

¹¹ J. McApline and B.P.J. Molly *Techniques for selection of biosphere reserves* Report of UNESCO Regional Workshop in Australia and New Zealand, 1977 (Australian and New Zealand National Commission for UNESCO, 1978) 31.

Over the years various concerns have been raised about how the MAB biosphere reserve program operates. Some concerns revolve around a basic fear and distrust of the United Nations, which will not be entertained for obvious reasons. Other concerns are more specific. These revolve around national sovereignty, the status of private property within biosphere reserves, the amount of control the United Nations has over the management of the biosphere reserves, and the effect that biosphere reserves might have on the economy of nearby communities.

There are two fundamental points in this regard:

- i. The UNESCO has no power to force changes in the resource management or ownership of biosphere reserves. The ICC does set standards for biosphere reserves, and through periodic reviews assesses whether the standards are being promoted. However, if they are not, the ICC can only encourage the local board to make the changes necessary, but cannot force any changes.
- ii. Participation in the biosphere reserve program is entirely voluntary, and land within the biosphere reserves remains under the control of its owners.

Others have questioned what effect the designation of a biosphere reserve might have on property values and on the willingness of businesses to locate within them, and whether the biosphere reserve will change patterns of tourism in the area. No economic or scientific studies have been done on any of these questions. However, anecdotal evidence suggests that in all likelihood the designation of a biosphere reserve has no effect one way or the other on property values. Nor is there any evidence that businesses will be less likely to locate within the buffer or transition zones of a biosphere reserve. Finally, there is nothing to suggest that a biosphere reserve does anything to hamper or discourage tourism to the surrounding region.¹²

Notwithstanding, there is scientific evidence that the management of biosphere reserves is sometimes suboptimal. A recent assessment (July 2010) of biosphere governance structures in three central-European countries: Poland, Czech Republic and Hungary, shows that institutional and structural flaws in the system of MAB institutions are amplified by governance weaknesses at the national level.¹³ The governance deficits revealed lack of both vertical integration regarding the MAB institutions and national authorities, as well as sufficient and appropriately trained personnel, funding and political back-up in local implementation. In the national context, the study recommends enhancing communication among stakeholders, fostering active participation and pushing capacity development. Moreover, the study recommends that the MAB Programme should strengthen the role of MAB National Committees as communication hub and facilitator of a national dialogue on sustainable development.

[The UNESCO process for establishing a Biosphere Reserve](#)

¹² The George Wright Organization (2010) "The UNESCO Man and the Biosphere Program: What's It All About?" <http://www.georgewright.org/mab.html#Anchor-47857>. Accessed on 2010-08-27.

¹³ Rainer Schliep and Susanne Stoll-Kleemann (2010) "Assessing governance of biosphere reserves in Central Europe" Land Use Policy 27 917–927.

Biosphere reserves are governed by the Statutory Framework for Biosphere Reserves — adopted by the UNESCO General Conference as part of the Seville Strategy (1996). This is not a binding framework and is seen as “soft law”. The participation of U.N. Member States in the UNESCO General Conference is the point of national oversight on the MAB Program. MAB National Committees ensure that biosphere reserves are respond to the criteria in the Framework and that they function properly. The application process starts by filling out a detailed nomination form.¹⁴ The nomination is then forwarded to the MAB Council where it is considered at one of its regular meetings. If the nomination is approved, then the designation is confirmed and the area begins to operate as a biosphere reserve.

The process is governed by Article 5 of the Statutory Framework for Biosphere Reserves:

Article 5 Designation procedure

1. *Biosphere reserves are designated for inclusion in the Network by the International Coordinating Council (ICC) of the MAB programme in accordance with the following procedure:*
 - (a) *States, through National MAB Committees where appropriate, forward nominations with supporting documentation to the secretariat after having reviewed potential sites...*

Article 5 makes it clear that the nomination of a biosphere reserve must go through the New Zealand government, on the recommendation of the National MAB Committee, which is different from the New Zealand National Commission for UNESCO, and is situated under the Department of Conservation.¹⁵

In summary, since the UNESCO is a government member body, the position is that where if it is desired to invoke a programme in a member country then (in New Zealand) it is the central government which must initiate the process as it is the government which has standing in the UNESCO system for this purpose. It would not be appropriate for a community board or territorial local authority to lodge an application as they do not have standing within the UNESCO system for this purpose.¹⁶

De-designation of biosphere reserves

As called for in the Statutory Framework for Biosphere Reserves (Article 9), every 10 years the MAB reviews each biosphere reserve in the network to make sure each is still meeting the criteria under Article 4 of the Framework. This is done by reviewing reports submitted by the managing organization (which in the case of Waiheke is likely to be the Local Board). If a particular biosphere reserve no longer meets the minimum criteria, the MAB Council will work with the managing organization to resolve the problem. If that is not successful, then the MAB Council can cancel the

¹⁴ The form is available at http://portal.unesco.org/science/en/ev.php-URL_ID=6949&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed on 2010-08-12.

¹⁵ The contact person is Paul R. Dingwall (dingwall@paradise.net.nz) in the Science & Research Unit, Department of Conservation. Mr. Dingwall was instrumental to the research that went into this opinion, for which I am very grateful.

¹⁶ This is the gist of a communication with the Andrew Bignell , the Manager of External Relations in the Conservation Engagement Group, the Department of Conservation (2010-09-06).

biosphere reserve designation and the area will no longer be referred to as such. To date, this has never happened, though agencies in several countries have voluntarily withdrawn non-functional sites with the agreement of the MAB Council.

Does Waiheke meet Article 4 Criteria?

Article 4 of the Statutory Framework details the criteria needed for the biosphere reserve designation:

Article 4 - Criteria

General criteria for an area to be qualified for designation as a biosphere reserve:

- 1. It should encompass a mosaic of ecological systems representative of major biogeographic regions, including a gradation of human interventions.*
- 2. It should be of significance for biological diversity conservation.*
- 3. It should provide an opportunity to explore and demonstrate approaches to sustainable development on a regional scale.*
- 4. It should have an appropriate size to serve the three functions of biosphere reserves, as set out in Article 3 [conservation, sustainable development and logistic support].*
- 5. It should include these functions, through appropriate zonation, recognizing:*
 - (a) a legally constituted core area or areas devoted to long-term protection, according to the conservation objectives of the biosphere reserve, and of sufficient size to meet these objectives;*
 - (b) a buffer zone or zones clearly identified and surrounding or contiguous to the core area or areas, where only activities compatible with the conservation objectives can take place;*
 - (c) an outer transition area where sustainable resource management practices are promoted and developed.*
- 6. Organizational arrangements should be provided for the involvement and participation of a suitable range of inter alia public authorities, local communities and private interests in the design and carrying out the functions of a biosphere reserve.*
- 7. In addition, provisions should be made for:*
 - (a) mechanisms to manage human use and activities in the buffer zone or zones;*
 - (b) a management policy or plan for the area as a biosphere reserve;*
 - (c) a designated authority or mechanism to implement this policy or plan;*
 - (d) programmes for research, monitoring, education and training.*

As stated in Article 4 (5), biosphere reserves are organized into 3 interrelated zones: (1) the core area, (2) the buffer zone, and (3) the transition area. The hurdle that needs to be met is the requirement that the core area is legally protected. This could correspond to a nature reserve or a national park. The core area could be a local authority rather than a national (DOC) area. While not essential, a core should have an approved protection or conservation management regime. A Queen Elizabeth II National Trust Open Space Covenant on private land would suffice.

Possibilities for the core area include Stony Batter, which is an historic reserve under DOC. Another possibility is the Te Matuku Marine Reserve which was established under the Marine Reserves Act

1971.¹⁷ Yet another possibility is the establishment of the Hauraki Gulf Marine Park under the Hauraki Gulf Marine Park Act 2000, which integrates the management of land and sea across 21 other Acts (including the Resource Management Act 1991).

In summary, the legally protected core area requirement should not be an issue preventing Waiheke from becoming a biosphere reserve.

Biosphere Reserves and Municipal Legislation

While in the past most countries did not enact special national legislation for biosphere reserves, opting instead to use existing legal frameworks for resource management and conservation, today an increasing number of countries are passing national biosphere reserve legislation in order to make their legal status perfectly clear.

In its twenty-first session (May 2009), as part of the implementation of the Madrid Action Plan, the ICC tackled the issue of the translation of the biosphere reserve concept in the framework of national legislations.¹⁸ A first study on the translation of the biosphere reserves concept into national law highlighted the issue of distinguishing the question of the international designation of biosphere reserves from the recognition of the concept (at 35):

International designation implies that the site concerned becomes a member of a global network established by UNESCO's Man and the Biosphere Programme, and, as such, the willingness to participate in international exchanges within this framework. The recognition of the concept into national law implies that the importance of complementarity between conservation and sustainable resource use, of human presence in protected areas, of participatory management, of benefit-sharing, etc. is recognized.

Recent laws show a trend towards a recognition of biosphere reserves, which goes in the same direction as the current discussion about and evolution of conservation concepts (connectivity, local participation, Category VI of IUCN, etc.). This progressive recognition of the biosphere reserve concept in law signals the evolution of nature and conservation law at various levels, as well as progress regarding the importance of the biosphere reserve concept, which has transformed from an experimental one to an idea for the future. By proposing a conservation model associated with economic and social development, the biosphere reserve concept constitutes a practical tool for putting in place sustainable development that can evolve and adapt to global changes.

¹⁷ Waiheke Forever "The Case for Waiheke Island to become a UNESCO Biosphere Reserve" Available at <http://waihekenova.wordpress.com/waiheke-forever/> Accessed on 2010-09-04.

¹⁸ Marie BONNIN and Mireille JARDIN (2009). "Legal interpretation of the biosphere reserve concept in the framework of national legislation" International Coordinating Council of the Man and the Biosphere (MAB) Programme. Twenty-first session Jeju Kal Hotel, Grand Ballroom, Jeju 25 - 29 May 2009. Available at http://portal.unesco.org/science/en/ev.php-URL_ID=7418&URL_DO=DO_TOPIC&URL_SECTION=201.html Accessed on 2010-09-07. SC-09/CONF.207/INF.4.

Discussion and Recommendations

The above analysis provides direct arguments in favour of establishing a Waiheke biosphere reserve.

- (a) Bureaucratic/legislative and financial implications: as indicated above, the UNESCO intervention in managing biosphere reserves is minimal. The fact that there is continuous increase in the number of biosphere reserves goes to show that net implications are positive. Thirteen new biosphere reserves were added this year, of which reserves were inscribed in Ethiopia and Zimbabwe for the first time. What is likely to happen is that Waiheke will become an international tourist destination in its own right, resulting in a *sustainable* economic boom on the island.
- (b) Biosphere reserves framework redundant: even if we were to accept that the New Zealand current regime under the Resource Management Act (RMA) 1991 is sufficient to enable all three functions carried out by the biosphere reserve concept (conservation, sustainable development and logistic support), the “badge” that comes from a designation by the UNESCO, and joining an international list of such sites cannot be redundant. The fact of the matter is that sustainable development is not synonymous with the definition of sustainable management under the RMA, but is a more encompassing concept recognising the possibility of simultaneously improving social, economic and environmental outcomes.
- (c) Mystery around the UNESCO idea: there is no mystery around the biosphere reserves concept per se. There are numerous sites on the internet, including NGO sites that provide in depth information on biosphere reserves. The MAB secretariat and the New Zealand National Committee for the MAB programme would be more than happy to answer any questions relating to the biosphere reserves concept. Nevertheless, it is imperative that the public is given more information about this international approach to sustainability. It will be a priority for the Waiheke Local Board to furnish the same, not just within Waiheke Island, but also on the national level.
- (d) Idea should be developed away from elections: the concept of biosphere reserves is probably the one thing that can prove instrumental for the future of Waiheke. Arguing that it is not political in nature or that it should not be part of the elections process suggests delegating its potential impact on the future of the Island to a secondary role. Such an understanding is likely to be misguided as to the importance of this concept and its ability to transform the Island in a way that no other issue can. This position wants to limit the issues of the local election to ones that would not shift the locus of control from central government to the Local Board.
- (e) Aspirational goal: the argument that the biosphere reserve should be a long-term objective rather than an immediate one is a variation on the previous argument. Both of these arguments suggest that the concept of biosphere reserves enables a level of local autonomy that the central government cannot, should not, and will not accept.

The central question to the issue of whether Waiheke should pursue a UNESCO designation is this: why are there no such reserves in New Zealand, given that the MAB programme has been designating such reserves since the early 1970s? I suggest that the answer comes from the fact that the biosphere reserves concept afford a level of autonomy to the local government/community that central government is not comfortable with, yet. To be fully informed on this matter, I put this

question to Nikki Kaye, the National Party MP for central Auckland, who in turn raised the question with the Minister for the Environment, the Hon Dr Nick Smith. At the time of writing these words, I still await an official response. But if my hypothesis is correct, it would mean that the ability of Waiheke to win the UNESCO designation is predicated on winning public support to “pressure” the government into shifting the locus of control to the Local Board. The process to achieving the same is double pronged and is detailed below.

Recommendations

As should be evident from the above, the issues raised by the biosphere designation are political rather than legal. Once the political support is secured, the legal requirements under the MAB Statutory Framework will not present any hurdles. Given this, the first step is to ensure that the issue of UNESCO designation becomes the primary issue in the election campaign. With a majority of Board members supporting the UNESCO designation, the next step would be to start lobbying the central government to submit an application to the MAB programme. Concurrently, and as part of this, the Board should increase its contact with existing island biosphere reserves to provide as much information as possible as to their experiences under the UNESCO designation. Obtaining support for the designation from other existing reserves, especially neighbouring ones in Australia, as well as the support of the local communities across New Zealand will lead the way in persuading the central government to proceed with the nomination process.

Notwithstanding, as identified above, the governance of biosphere reserves is likely to suffer if there is no strong coordination with central government. Given this, and the trend for recognising the biosphere reserve concept through specific municipal legislation suggest that the effort to designate Waiheke should also have the strategic inclination to effectuate such legislative changes. This can be done through a private bill through Parliament to amend the existing Reserves Act 1977; again, once the political will is there to do so. The result would be similar to the Australian legislation under Environment Protection and Biodiversity Conservation Act 1999, Chapter 5 – Conservation of biodiversity and heritage, Part 15 – Protected Areas; and Environment Protection and Biodiversity Conservation Regulations 2000, Part 10 Protected areas (other than Commonwealth reserves).