



# Whose interests count? The Malvern Hills Protection Society and an irrigation scheme proposal

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## 1. INTRODUCTION

The Malvern Hills area, located at the western edge of the Canterbury Plains, became the subject of a proposed irrigation scheme in 2000 (see Figure 1). The scheme proposed to take water from the Rakaia and Waimakariri Rivers to store in a reservoir located in the Malvern Hills, then irrigate 60,000 hectares of land on the central Canterbury Plains. A trust, established by Selwyn District Council (SDC) and Christchurch City Council (CCC), would make an application for more than 30 resource consents. Later the trust would establish a company which was granted requiring authority status by the then Minister for the Environment. This allowed the company to use the Public Works Act 1981 to apply to place designations over private land for a dam and a reservoir (CPWT 2005). Some Malvern Hills residents opposed the scheme. This article charts their experience and the outcome of their participation in the Resource Management Act 1991 (RMA) resource consent hearing process.

The process was gruelling and contentious for the community. While the outcome was somewhat favourable for them, over-arching questions remain as to whose interests were represented, the extent of central governments' control, and why the scheme was not declined in its entirety despite the SDC's own experts concluding the scheme was contrary to the sustainable management purpose of the RMA (Boyes 2008, Butcher 2008).

## 2. BACKGROUND

A document obtained in 2009 under the Official Information Act (OIA, 1982) from the then Ministry of Agriculture and Forestry (MAF) discusses the potential propositions for water storage and irrigation

in Canterbury (MAF, 2009). They recommend "any intervention to facilitate the delivery of irrigation development in Canterbury should address the following three key blockages", these being "the uncertain planning framework governing the management of water in Canterbury, the controls set by existing and proposed Water Conservation Orders (WCO) and the conditions attached to existing resource consents which have been developed in the context of the above and therefore lock in suboptimal outcomes" (MAF, 2009, p. 4). The Ministry recommends "two broad options for government intervention": first, to grant itself power to establish a panel to review WCOs and "halt the current process on a Hurunui WCO"; second, "to enhance the existing intervention powers of the Minister for the Environment to enable appointment of commissioners to take over planning functions of the Rakaia and Hurunui catchments" (MAF, 2009, p. 9). MAF advises the choice of intervention would be determined by the result of the performance review of the Canterbury Regional Council (CRC), known as the Creech Report. This latter report recommends establishing new legislation and a new entity for managing water as well as the replacement of councillors with a commission "to manage the necessary organisational change" (Creech, Jenkins, Hill & Low, 2010, p.11). The central government passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 under urgency, dismissed elected regional councillors and replaced them with commissioners with special powers over the management of the region's water resource, which CRC otherwise did not have (Rennie, 2010; Joseph, 2010). Joseph (2010) argues that the Act is "constitutionally repugnant" (p. 194).

Arguably, the establishment of the Environment Canterbury (Temporary Commissioners and Improved

Water Management) Act 2010 was designed to fast track irrigation development in the Canterbury region. Among proposed irrigation schemes identified in the MAF OIA document was the Central Plains Water Scheme.

In 2000, the Central Plains Water Enhancement Steering Committee (CPWESC), established by the SDC and the CCC, was tasked with investigating the feasibility of water storage schemes for the central plains area (CCC & SDC, 2000). The CPWESC spent several months undertaking consultation with the community and later in 2000 produced a summary of issues and outcomes associated with potential water enhancement schemes for central Canterbury (CPWESC, 2000). The committee recommended that as a plan for a water enhancement scheme evolved, “management of the process of consenting and implementation should move to reflect the interests that will benefit from the project” (Watson, 2002, p. 1). The CPWESC also advised council that if resource consents to take and use water were to be obtained, then they “should be owned by an entity that would ensure the interests of the community were paramount, in the way the consents were exercised” (Watson, 2002, p. 1).

In response, the SDC and the CCC formed the Central Plains Water Trust (CPWT). The trust conditions were set out in a Memorandum of Understanding, identifying specifically that “the Trust would not be established purely to pursue commercial objectives” (Buddle Findlay, 2003, p. 7). The original trust consisted of a total of 13 members including two Ngāi Tahu appointments and two appointments made by the Parliamentary Commissioner for the Environment (CPWT, n.d). The trust would apply for and hold resource consents, in the interest of the public, then grant exclusive use to the entity established to build and operate the proposed irrigation scheme (CPWT, 2003). Both SDC and CCC argued public ownership of the resource would be retained by establishing a trust as owner of resource consents, to prevent the region’s natural resources from corporate exploitation (Buddle Findlay, 2003; Hutching, 2008).

In 2004, the CPWT established Central Plains Water Limited (CPWL). A Memorandum of Agreement signed in 2004, established the terms of the relationship between the trust and the company, the most notable being CPWT granting exclusive rights to the CPWL to use the resource consents to build and operate an irrigation scheme (CPWT, 2006a). CPWL’s purpose as a shareholder-owned company was to progress the resource consent applications, produce a detailed

scheme design and construct infrastructure for an irrigation scheme. In November 2004, CPWL undertook its first share offer, succeeding in raising initial capital to advance the resource consent process (CPWL, 2004). Of approximately 400 shareholders, significant holdings belong to a range of corporate dairy farms including Purata Farms Limited, Lynton Dairy Limited, Fonterra, P & E Limited, Camden dairy farms, and Grasslands (NZCO, 2014). CPWL also raised funds through ratepayer funded loans and Crown appropriations (CPWL, 2004; CPWL, 2014; Mitchell, 2007).

The original CPWL scheme proposed a 55 metre high dam and storage reservoir in the Malvern Hills, with capacity for 280 million cubic metres of water and canals to deliver water to shareholders peppered between the Waimakariri and Rakaia Rivers, west of State Highway 1 (CRC, 2008; see figure 1). In June 2006, CPWT made an application to SDC and CRC for more than 30 resource consents for water take and use, discharge, and land use consents. As noted previously, CPWL applied for and received requiring authority status in 2005 from the Minister for the Environment, to use the Public Works Act 1981 for application to designate private land for a dam and reservoir. Under the RMA, CPWL served SDC with a Notice of Requirement (NoR) in June 2006 to designate land for the main headrace canal, the intake canals and the dam site and reservoir (CPWT, 2006b).

In 2001, the first newspaper articles appeared outlining the CPWESC activities. Headlines at the time read “Canterbury farms may get artificial lake” (Robson, 2001a, p. 2) and “Water Fight” (Keene, 2001, p. 18). Robson (2001b, p. 4) reported that Malvern residents were gearing up to fight a massive irrigation lake proposal.

In 2001 the Dam Action Group (DAG) was formed by some Malvern Hills residents to engage in consultation with the scheme proponents. The DAG meeting minutes over the next two years repeatedly report the challenges of extracting any substantial details about the scope of the scheme (DAG, 2002). The DAG’s opposition was broad, asserting devastating social impacts, loss of entire properties, environmental degradation, the risk of dam burst and uncertain economic benefits (DAG, 2002). During consultation, it became apparent an application by SDC and CCC to CRC to abstract water from the Rakaia and Waimakariri Rivers had already been lodged (McKinlay, 2001). The community viewed this as a betrayal, serving only to harden opposition to the scheme (McKinlay, 2001; Malvern Hills Protection

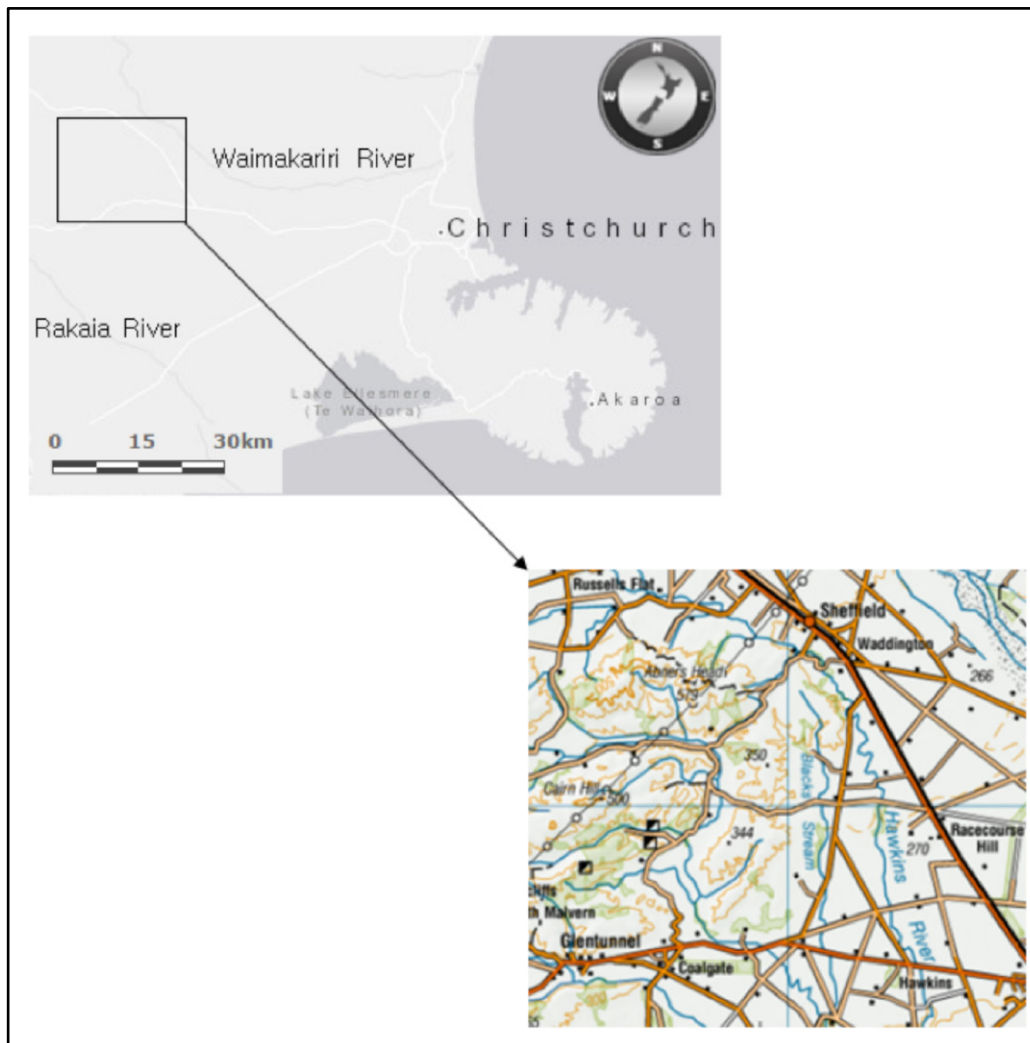


Figure 1: Map of the Malvern Hills region, located at the western edge of the Canterbury plains. The top map is based on Statistics New Zealand data (see <http://www.stats.govt.nz>) which is licensed for re-use under the under Creative Commons Attribution 4.0 International licence. The lower map has been sourced from Land Information New Zealand (see <http://www.linz.govt.nz>) which is licensed for re-use under the Creative Commons Attribution 3.0 New Zealand licence.

Society, personal communication, April 2015). The public relations company engaged to undertake consultation attempted to reassure the community of the local authorities' need to secure water rights, and to ensure public money spent developing the proposal would not be wasted (McKinlay, 2001).

In February 2003, the Waianiwaniwa Valley in the Malvern Hills was reported by CPWT to be the preferred site for the dam and reservoir (DAG, 2003). The consultation with affected parties was considered by some opponents as poorly executed or non-existent and according to the Coalgate community "totally inadequate, token and often misleading" (Morris, 2008, pp. 24-25). As the impending reality of fighting an irrigation scheme was realised by the community, the DAG needed to become an incorporated society to levy a fee from members, fundraise, as well as protect its members from individual liability that may result from participating in the resource consent process

(DAG, 2003). The DAG therefore transformed itself into the Malvern Hills Protection Society Incorporated (MHPS), and developed a constitution. Promotion of conservation, protection and enhancement of the historical, cultural, ecological, and environmental and community values of the Malvern Hills were central to its cause (DAG, 2003; MHPS, personal communication, 24 April, 2015).

Eventually a suite of applications for resource consents under numerous notifications would be made by the CPWT over a period of two years (CRC, 2008). Because of the scheme's complexity, the public submission periods were extended to 40 working days. More than 3000 submissions were received, with over eighty percent in opposition and 174 persons stating they wished to be heard (CRC, 2010). Concerned about the misuse of council funds, a request by the MHPS to the Auditor General to investigate the investment of public money in an unclear public-private arrangement

was lodged by the MHPS. The request was declined on the grounds of being beyond the Auditor General's jurisdiction because of the involvement of private shareholders (Robertson, 2006).

### 3. THE ENVIRONMENT COURT DECLARATION

Prior to the CRC resource consent hearing, MHPS members were eager to understand the conditions of the NoR. While some landowners were well aware of the scheme, others were informed by way of a letter from the SDC addressed "Dear Landowner". Several would discover a designation after obtaining a Land Information Memorandum report when trying to sell land (MHPS, personal communication, April 2015). In 2007, the MHPS, on behalf of its members, sought legal advice to clarify the matter of the NoR. Legal advisors recommended the society seek a declaration from the Environment Court to determine the scope of the designation. Technical changes were made to the scheme which the community found unacceptable, so acting on legal advice they sought a clarification. The society, as an opposing community group, were targeted by media to share their impassioned thoughts on the scheme. Later this media attention would be used against them in the Environment Court. Last minute changes to the society's legal representation meant an unprepared lawyer was caught off-guard when counsel for the applicant brought this media attention into the court (MHPS, personal communication, April 2015). In *Malvern Hills Protection Society Incorporated v Selwyn District Council C105/2007 [2007] NZEnvC 234*, Judge Smith accused MHPS of "seeking to frustrate CPWL and exhaust its funds, patience and time" and of undermining the Minister's decision to grant requiring authority status. Judge Smith accused MHPS of acting in a "frivolous and vexatious manner" and ruled that power had been abused by the Society (p. 25). Despite the proceedings, in *Malvern Hills Protection Society Incorporated v Selwyn District Council C136/2007 [2007] NZEnvC 318*, Judge Smith ruled the Society did have a legitimate concern, but ordered them to pay costs of \$26,000 (p. 9). While the declaration outcome was a harsh financial blow to the society, it served only to motivate and empower the community<sup>1</sup>.

1 While the MHPS continued its battle, the level of costs had a chilling effect on at least one community group, influencing it against challenging the actions of a developer in an unrelated case in the Lyttelton Harbour (H. Rennie, personal communication, August 2015).

### 4. THE INDEPENDENT HEARING

The CRC resource consent hearing commenced on the 25<sup>th</sup> February, 2008 (CRC, 2010). Four independent hearing commissioners were appointed. The commissioners concluded early on that the goal of the scheme was to secure water for the benefit of the scheme shareholders and the fact a trust was behind it was irrelevant, agreeing to view the trust and the company as one entity, despite the two being set up for entirely different purposes (CRC, 2010, para. 1.57). The issues were considered by the commissioners as "complex, contentious and critically important both for the community as a whole, and for affected persons as well as shareholders" (CRC, 2010, para. 1.23). The hearing took 68 days, including five field visit days over a period of two-and-a-half years and was described by the hearing commissioners as having a "voluminous" amount of evidence and an "exhaustive process" (CRC, 2010, para. 1.25). The commissioners "adopted an inquisitorial approach and asked a lot of questions" to ensure those most profoundly affected and concerned could be reasonably heard (CRC, 2010, para. 1.26). Every day of the hearing was attended by three members of the MHPS. Many of the society's members presented their own submissions at the hearing with wide-ranging views and critical local knowledge to which the commissioners listened with intent (MHPS, personal communication, April 2015).

Before the close of the hearing, the commissioners released a number of minutes. In April 2009, the commissioners "advised CPWL that we would most likely be recommending that CPWL should withdraw its Notice of Requirement (NoR) for the Waianiwiwa dam and reservoir... and that we would be declining associated consents" (CRC, 2009a, para. 2). In July 2009, Minute 10 was issued explaining the reasons behind their decision. The commissioners were not convinced that economic benefits of the dam and reservoir would outweigh adverse social, cultural and economic effects on the Coalgate and Waianiwiwa communities. They concluded that the dam and reservoir components of the scheme did not meet the sustainable management purpose of the RMA (CRC, 2009b, para. 4.2). CPWL accepted the commissioners' recommendations and withdrew the NoR for the Waianiwiwa Valley reservoir and dam (CRC, 2010, para. 1.9).

## 5. POWER

Despite a gruelling decade, the citizens of the Malvern Hills received a favourable outcome by the withdrawal of the NoR. Regardless of the many hurdles placed in the community's path, public participation in decision-making processes under the RMA succeeded in allowing a fair hearing. However, a raft of questionable actions were also apparent:

- The application for water by the CCC and the SDC during consultation;
- the setting up of a public trust to front a scheme that would provide benefits to corporate shareholders;
- inadequate consultation;
- compulsory acquisition of private land;
- ignoring SDC's own s. 42A report recommendation;
- non-cooperation of the Auditor General to investigate conflicts of interest;
- the legal advice to seek a declaration from the Environment Court and the behaviour of the Judge by imposing costs on the society, despite recognising it had a valid concern;
- the content of the OIA paper;
- the removal of elected councillors from the CRC

These actions highlight that a determined central government was clearly at work with regard to the allocation of Canterbury's water resource (Drage, 2011). Nevertheless, the commissioners' decision with regard to the dam and reservoir reiterates that social well-being should not be compromised at the expense of economic growth and productivity (CRC, 2010).

## 6. CONCLUSION

The Malvern Hills Protection Society's involvement in the Central Plains irrigation scheme RMA resource consent process demonstrates the effectiveness of community participation in the decision-making process and the independent hearing procedure of the RMA. When a community is organised, supported and informed it plays a legitimate and powerful role in influencing decisions which affect their communities. Decisions under the RMA are legitimised by the participation of the community. Despite the numerous hurdles, the hearing process thrashed out the most comprehensive information available and arrived at a decision. Though

a compromise, it was generally acceptable to the community and was not appealed by either side. Such a process demonstrates that power does not necessarily lie in the political or corporate realm, it is just as strong within citizenry. Whose interests the local government, especially the SDC, were representing and why is a topic worthy of further investigation, which future researchers may wish to explore.

## 7. REFERENCES

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## **8. ENVIRONMENT COURT DECISIONS**

*Malvern Hills Protection Society Incorporated v Selwyn District Council C105/2007 [2007] NZEnvC 234 (9 August 2007)*

*Malvern Hills Protection Society Incorporated v Selwyn District Council C136/2007 [2007] NZEnvC 318 (30 October 2007)*