

**IN THE MATTER OF** the Resource Management Act  
1991

**AND**

**IN THE MATTER OF** various applications by the Central  
Plains Water Trust to the  
Canterbury Regional Council.

## **Report of Matthew McCallum-Clark**

**Date of Hearing: 12 – 16 October 2009**

### **INTRODUCTION**

#### **Qualifications and Experience**

1. My full name is Matthew Eaton Arthur McCallum-Clark. I am a director of the resource and environmental management firm Incite, which has offices in Auckland, Wellington, Nelson, and Rangiora.
2. I hold a bachelor's degree in law from Canterbury University and a bachelor's degree in commerce (economics) from Otago University.
3. I have worked in resource management for over 15 years, working for councils and predominantly consultancy practices. Over the years I have worked on a range of central and local government planning projects and projects for the corporate sector, including:
  - Providing RMA and environmental policy advice to the Ministry for the Environment, Ministry of Transport, the New Zealand Transport Agency, New Zealand Police and the Department of Corrections
  - Managing the RMA and environmental requirements for a number of large scale infrastructure projects, including for telecommunications, radio networks and the energy sector.
  - Managing the Environment Canterbury processing of a number of water takes in South Canterbury.
  - Acting as a reporting officer for Hurunui District Council's recent Amberley Plan Changes.

4. I acknowledge that I have read the code of conduct for expert witnesses contained in the Environment Court's Practice Note dated 31 March 2005 and that I agree to comply with it.

### **Outline of this Evidence**

5. I am here to provide evidence with respect to Plan Change 1 to the Waimakariri River Regional Plan and in particular to advise on the submissions received and issues with respect to the weight to give the Plan Change.
6. In brief, this evidence will cover three main points:
  - A brief explanation of the timing and process of developing Plan Change 1;
  - An analysis of the submissions received to date; and
  - An assessment of the weight that might appropriately be given to the Plan Change.

### **PROCESS AND TIMEFRAME**

7. As outlined in the evidence of Anna Veltman, the Plan Change 1 process officially began in November 2007, with a decision by council to proceed with a plan change. During 2008, reporting and investigations were undertaken, primarily by NIWA. In early 2009 I was engaged to assist with the development of the Plan Change.
8. Prior to notification of the Plan Change, there were additional investigations undertaken, consultation with a variety of parties and draft plan changes prepared and debated by the Council. The text of a plan change and section 32 report were approved by the Council at its meeting of 30<sup>th</sup> July 2009. The Plan Change was notified and submissions invited on 8<sup>th</sup> August 2009. Submissions closed on 11 September 2009.
9. At the time of drafting this evidence, the submissions are currently being summarised.
10. When the decisions requested in the submissions are appropriately summarised, it will be notified for further submissions. My understanding is that this will occur in a relatively short time frame. While it is not possible, at this point, to give a firm timetable, it is unlikely that hearings will commence prior to Christmas, but it is probable that they will occur early in the New Year.

11. At the outset it is important to point out that Plan Change 1 was initiated in response to a clear deficiency in the flow regime for the mainstem of the Waimakariri River. When the Waimakariri River Regional Plan was first developed, the "B" Block water was seen as so unreliable that a cap on total allocations and controls to preserve flow variability were not necessary. The assumed total demand for the "B" block at the time was approximately 8 cumecs. This lies at the heart of the problem, as, more recently, this assumption has proven false with applications received for approximately 45 cumecs of water takes and other large take proposals being discussed with ECan staff.
12. Without some form of change to the existing flow regime, there is a substantial likelihood of the flows in the River being drawn down to the minimum flow for extended periods, particularly in the summer-autumn seasons. This would have adverse effects on the health of the river and these flows would generally be below the level where the substantial recreational interests would prefer.

### **SUBMISSIONS RECEIVED**

13. At the submission closing date of 11 September 2009, 75 submissions had been received on Plan Change 1.
14. At the time of drafting this evidence, the submissions are being summarised, prior to the notification of a summary of submissions for further submission. From a brief review of the submissions, I can advise as follows:
  - There do not appear to be any substantive procedural issues raised;
  - While there are some comments on the adequacy of the technical analysis, there are no or only limited direct submissions challenging the adequacy of the s32 report;
  - While it is unlikely that there is an even balance between the persons supporting and the persons opposing the Plan Change, there is a substantial number in each group;
  - There are a number of submissions that seek the withdrawal of the Plan Change as a whole, the majority based on opposition to the proposed 30 cumec gap;

- There are no issues that have escaped submission (either in opposition or seeking changes), including those that I would consider to be of a more technical nature, such as the changing of the planning maps to correct errors;
  - There are no matters that could be treated as beyond challenge pursuant to section 19.
15. There are a number of issues that are submitted on that are outside the scope of the Plan Change as notified, such as the minimum flow, which will lead to some procedural issues to be considered at a later date.

### **THE WEIGHT TO BE ATTRIBUTED TO PLAN CHANGE 1**

16. In this assessment of the weight to be applied, I have reviewed the RMA, relevant case law and particular facts of the present situation.
17. The core principles regarding the assessment of weight to be applied to a proposed plan change were succinctly recorded in *Keystone Ridge Limited v Auckland City Council*<sup>1</sup>. Those principles are:
1. *The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.*
  2. *The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:*
    - *The extent (if any) to which the proposed measure might have been exposed to testing and independent decision making.*
    - *Circumstances of injustice.*
    - *The extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.*
  3. *In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there has been a significant shift in council policy and the new provisions are in accord with Part II, the court may give more weight to the proposed plan.*

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<sup>1</sup> High Court, AP24/01

18. There are a number of other cases which are peripherally relevant, and expand upon some of the points raised in Keystone Ridge.

### **Principle 1 – Progress Through the Plan-making Process**

19. The first principle relates to the progress of the plan change through the statutory process. For Plan Change 1, it is clear that the Plan Change is only at the relative beginning of the statutory process, submissions having recently closed. In addition, as outlined above, the submissions are relatively numerous and varied, with no provision in the Plan Change having escaped submissions in opposition or seeking further change.
20. However, I note that there is a large degree of overlap between the process of this application and the progress of the Plan Change, such that the Plan Change is likely to have advanced further through the plan-making process by the time a decision is issued on this application.

### **Principle 2 – Case-by-case Assessment**

21. The second principle requires a case-by-case assessment and has three parts.
22. The first part relates to the extent that the plan change has undergone independent testing and decision making. This Plan Change has yet to reach that phase and accordingly no independent testing or decision making has occurred.
23. The second part relates to circumstances of injustice. The case law on this topic appears to be somewhat mixed, in terms of exactly what circumstances of injustice actually means, and at very least it appears to have a wide criterion. Obiter comments on the issue are common, but seldom, if at all, do they reach the crux of a decision. There are examples of situations where what has been a permitted activity has changed, and the injustice has been identified as being that of an applicant with legitimate expectations of being able to undertake an activity as of right, prior to the plan change. Conversely, where no legitimate development expectation previously existed, it is speculated that no injustice has occurred (see *Lee v Auckland City Council*<sup>2</sup>). There are other situations where it is speculated that giving low weight to a

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<sup>2</sup> W14/95

plan change may mean that supporters of the plan change would suffer injustice (see Keystone Ridge). For Plan Change 1, there are clearly a number of live applications, including the one before this hearing, which may be affected by this Plan Change. However, I do not consider this to be an unusual circumstance, such that it would automatically create an injustice supporting the giving of low weight to the Plan Change, particularly as there is no as-of-right suggestion. Further, I highlight the passages above which identify the reasons for the Plan Change and the clear inadequacy of the existing flow regime. In the light of the acknowledged inadequacy of the current flow regime, I question whether an injustice is likely to occur.

24. The third part is the extent to which a new measure might implement a cohesive pattern of objectives and policies in a plan. In my opinion, this is a critical element. The Plan Change has been undertaken because of a deficiency in the flow regime for the mainstem of the Waimakariri River. As has been identified above, the existing flow regime is inadequate for managing large takes above the "A" Block, primarily because at the time of the drafting of the Plan it was assumed that no large takes would be applied for and therefore rules were not necessary. With the removal of the assumption that no applications would be made, the existing rules in the Plan do not implement Objective 5.1 of the Plan, nor does it, in my opinion, accord with Part II of the RMA.

### **Principle 3 – A Significant Shift in Council Policy to Accord with Part II**

25. The third principle reinforces that each case should be considered on its merits, and identifies that more weight can be given to a proposed plan if there is a significant shift in council policies and the new plan is in accordance with Part II of the Act.
26. In my opinion, this principle applies most directly to comparisons of weight between transitional and proposed plans, particularly where it could be said that the transitional plan has limited objectives and policies or that it has not been developed under an RMA framework. There are a number of cases specifically on this topic (for example *Lee v Auckland City Council*<sup>3</sup> and *Wyatt v Auckland City Council*<sup>4</sup>), many of which are normally distinguished in a plan change situation where both the operative plan and the plan change have been developed under an RMA framework. However, I note that in

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<sup>3</sup> W14/95

<sup>4</sup> W86/95

this instance it is clear that the existing provisions of the Waimakariri River Regional Plan, and the lack of any B Block allocation regime do not achieve Part II of the RMA.

## CONCLUSION

27. In summary, it would be relatively easy to dismiss Plan Change 1 as having low weight, as it has been only a limited way through the RMA plan-making process. While such an option may have some attraction, in my opinion there are three matters that are worthy of further consideration:

- The decision making process on this resource consent application has a degree of overlap, in terms of timing, with the Plan Change 1 process. Environment Canterbury is progressing this Plan Change promptly, with hearings expected to commence early next year. While it is unlikely that decisions on the Plan Change will be released prior to the decision on this application, its weight will increase somewhat through this process.
- The Plan Change is addressing an accepted deficiency in the Waimakariri River Regional Plan flow regime for the mainstem where, in my opinion, it is generally accepted that the existing flow regime was based on a false assumption. In my opinion, the existing flow regime does not achieve the purpose and principles of the RMA, or effectively implement Objective 5.1.
- It is my opinion that the application, as lodged, reflects the existing flow regime, which has generally been accepted as not a sustainable use of resources. The Plan Change sets out an alternative flow regime which is supported by the scientific analysis undertaken. If the commissioners were to grant this application on the basis of a further alternative flow regime, this application is sufficiently dominant in terms of quantum of water in the "B" Block that the Plan Change process and any allocation regime therein would become somewhat redundant. The inevitable consequence would be that either the consent would need to be reviewed almost immediately, or the Plan altered to align with the consent as granted.

28. Reviewing the individual circumstances of this plan change and this application, it is my opinion that Plan Change 1 should be given modest weight at this point, rather than the low or insignificant weight suggested by the early stage the Plan Change is at through

the RMA plan-making process. Further, it may be appropriate for the Commissioners to further review the appropriate weight to give the Plan Change closer to the time of issuing a decision.



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Matthew McCallum-Clark

16 September 2009