Before the Independent Hearing Panel

In the Matter	of the Resource Management Act 1991 (**RMA**)
And	
In the Matter	of an application to the Central Otago District Council and Otago Regional Council for resource consent to establish and operate a gold mining activity at 1346 – 1536 Teviot Road, Millers Flat
Reference	RC230325 (Central Otago District Council) RM23.819 (Otago Regional Council)

Legal Submissions on behalf Hawkeswood Mining Limited

Dated 8 May 2024

Jeremy Brabant

Barrister

Foundry Chambers

Level 4, Vulcan Buildings

PO Box 1502, Shortland St

Auckland City

021 494 506

Email: jeremy@brabant.co.nz

May it please the Commissioners:

Introduction

1. These legal submissions are presented on behalf of the Applicant, Hawkeswood Mining Limited (**HML**).

2. HML seek all relevant consents required to establish and operate an alluvial gold mining operation in a Rural Resource Area at 1346 – 1536 Teviot Road, Millers Flat, Roxburgh (**Site**). Consents are sought from Central Otago District Council (**CODC**) and the Otago Regional Council (**ORC**).

3. Some earthworks have already been undertaken on the Site for which retrospective consent is sought as part of this consenting exercise.

4. The overall activity status is discretionary.

5. Both s 42A reports recommend the application for consent be declined.

Proposal

6. HML is a New Zealand owned mining company operating in the South Island since 2005.

7. Descriptions of the proposal are set out in:

    a. The application for resource consent and the supporting documentation;

    b. The evidence of Ms Collie[1] and Mr MacDonell;[2]

    c. The CODC s 42A Report;[3]

    d. The ORC s 42A Report;[4] and

[1] At [14] – [23].
[2] At [7] – [11].
[3] At [11] – [34].
[4] At [2.2].

e. The evidence on behalf of HML.

8. The key aspects of the proposal can be summarised as:

    a. Removal and stockpiling of overburden;

    b. Staged mine pit excavation;

    c. On-site processing of gold bearing wash utilising water and gravity separation methods;

    d. Replacement of tailings and overburden in the mine pit;

    e. Progressive rehabilitation of the Site.

9. From a technical perspective, features of the proposal include:

    a. The principal water source for washing gold-bearing gravels is groundwater extracted from the mine pit.

    b. The water take is predominantly non-consumptive, with water taken during initial dewatering treated in a discharge settlement pond before being returned to land overlying the aquifer and soaking back into groundwater.

    c. The extraction, screening and gold recovery process will be undertaken without the use of chemicals.

    d. The processing of alluvium through the gold recovery plant is undertaken as a wet process, thus the likelihood of that activity generating particulate emission is very low.

    e. There will be no earthworks within 20 m of any watercourse, and no discharge of treated water to land within 50 m of any watercourse, including the Clutha River / Mata-au and Tima Burn.

10. A consent duration of 10 years is sought with the exception of the water take, which has a maximum duration of 6 years.

11. As you are aware, the application in part seeks retrospective consent. There is nothing inherently wrong with the grant of a retrospective consent.[5]

Witnesses

12. The following witnesses have lodged evidence for HML:

    a. Richard Allibone – freshwater ecology;

    b. Simon Chapman – lizard ecology;

    c. Anita Collie – planning - district;

    d. Logan Copland – transportation;

    e. Nigel Goodhue – air quality;

    f. Andrew Hawkeswood – corporate;

    g. Nevil Hegley – acoustic;

    h. Tom Heller – hydrogeology;

    i. Simon Johnstone – corporate and management;

    j. Ciaran Keogh - contaminated land;

    k. Colin Macdiarmid – Geotech – batter slopes;

    l. Barry MacDonell – planning – regional;

    m. Mike Moore – landscape;

    n. Victoria Ross – archaeology;

    o. Neil Williman – flood hazard; and

    p. Dr Barrie Wills - ecology – flora.

[5] In *Colonial Homes Ltd v Queenstown Lakes DC W104/95* (PT), the Tribunal emphasised that consent authorities should not use the resource consent provisions of the RMA in a punitive manner.

Statutory Assessment

13. Section 104 of the Resource Management Act 1991 (**RMA**) provides the proposal is to be assessed in terms of actual and potential effects on the environment, the relevant objectives and policies of the relevant planning documents, and Part 2 of the RMA.

14. As experienced Commissioners you will be familiar with section 104. I remind you the assessment required is as follows:

    a. Identify the relevant section 104 matters.

    b. Carefully assess the evidence on those matters, having regard to aspects of mitigation and outcomes of imposing conditions of consent.

    c. Consider the application, submissions, and evidence, subject to Part 2, having regard to section 104(1): the actual and potential effects on the environment and any offset or compensation proposed, any relevant planning document, and any other relevant considerations.

    d. Decide the weight that should be given to the matters in subsections 104(1)(a), (ab), (b) and (c);

    e. Having regard to the effects in the context of properly weighted objectives and policies under section 104(1) and any other relevant consideration, arrive at a judgement whether the proposal promotes the sustainable management of natural and physical resources and decide to grant or decline consent accordingly (s 104B).

Receiving Environment

15. The "environment" embraces not only the existing environment, but also the future state of the environment as it might be modified by permitted activities and by resource consents which have been granted where it

appears likely[6] that those consents will be implemented.[7]

16. The receiving environment does not include effects of resource consents that may be sought in the future, as that is the realm of speculation.

17. Also important is that case law has established a consent authority should not consider a future environment that is artificial – there is a need for a "real world analysis" when determining what the environment is.[8]

18. The Site and surrounding environment are described in:

    a. The evidence of Ms Collie,[9] section 2 of the AEE, the Landscape Effects Assessment Report and Graphic Supplement, and Mr Moore's evidence.

    b. The evidence of Mr MacDonell[10] and Mr Heller.[11]

    c. The CODC and ORC s 42A Reports.

19. The requirement to undertake a real-world analysis should not be lost sight of. Desired, hypothetical or historical versions of the environment cannot be substituted for what exists.

20. In the case of unconsented works (which do not have a permitted status), it is accepted that these do not form part of the receiving environment.

Written Approvals

21. A significant number of written approvals have arisen from a comprehensive consultation program undertaken by Mr Johnstone. The updated list of written approvals is addressed in the evidence of Ms Collie[12] and Mr MacDonell.[13] These written approvals encompass the majority of

[6] Likely means "more likely than not".
[7] *Queenstown Lakes District Council v Hawthorn Ltd* [2006] NZRMA 424 at [79].
[8] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [85], adopted by *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [64].
[9] EiC Collie, at [27] – [30].
[10] EiC MacDonell, at [12].
[11] EiC Heller at [17].
[12] EiC Collie, at [33] – [36].
[13] EiC MacDonell, at [22] – [25].

the land surrounding the Site and cover every potentially affected water bore with the exception of one.

22. When undertaking your assessment of effects, you must take great care to ensure that effects on those parties who have provided written approval is disregarded.

Consultation

23. With respect to consultation, HML has committed to a process which was wide ranging and thorough as referred to in the evidence of Mr Johnstone.[14]

24. The absence of a cultural impact assessment is referenced in the section 42 A reports on this matter. The evidence of Mr Johnstone is that one was sought, and in addition to that particular request substantial efforts were made to engage over a generous period of time. Efforts have continued despite limited responses, and a range of further information and assessments have been provided.

25. The principles set out by the Court of Appeal in *Wellington International Airport v Air New Zealand* are often referred to as a useful elucidation of the principles of consultation:[15]

    a. "Consultation" is not to be equated with "negotiation". The word "negotiation" implies a process that has as its objective arriving at agreement. However, "consultation" may occur without those consulted agreeing with the outcome.

    b. Consultation includes listening to what others have to say and considering the responses.

    c. The consultative process must be genuine and not a sham.

    d. Sufficient time for consultation must be allowed. There is no one fixed rule as to what is sufficient time.

[14] EiC Johnstone, at [6] – [20].
[15] *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 (CA).

e. The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.

f. The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in its mind.

g. Consultation is the statement of a proposal not yet fully decided upon.

26. The Courts have also been clear that it is inappropriate for decision-makers under the RMA to "reward" parties who refuse to engage by upholding later claims by such parties that insufficient consultation or information gathering was undertaken by the applicant.[16]

27. In regard to iwi consultation, the Courts have confirmed that lack of success in consultation with tangata whenua does not amount to a failure to meet consultation responsibilities,[17] and Part 2 does not confer a right of veto to mana whenua in consultation on a proposal.[18]

Effects

28. The effects of the proposal have been the subject of extensive assessment through the application, in the s 42A reports and in the evidence lodged on behalf of HML.

29. I commence by recording that the duration of the activity is a relevant matter going to the assessment of effects. Temporary effects are of course ones which still qualify as an effect for assessment. However, it is trite that whilst a temporary effect cannot be ignored, nor on the other side of the

[16] *Genesis Power Ltd v Manawatu-Wanganui Regional Council* [2006] NZRMA 536 at [71].
[17] See *CDL Land NZ Ltd v Whangarei District Council (1996)* 2 ELRNZ 423 (EnvC) at pg 428 and *Te Atiawa Tribal Council v Taranaki Regional Council* A015/98, 13 February 1998 (EnvC) at 8.
[18] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232 at [212]; *Te Atiawa Tribal Council v Taranaki Regional Council* A015/98 at 8.

coin can an effect of limited duration be treated in an identical manner to a permanent effect.

30. Also relevant is the observation that in assessing the degree of adverse effects, a consent authority may (and in fact must) reduce the scale of any potential effects to reflect the impact of any proposed consent conditions. For example (while expressed in the context of a s 104D assessment, it equally applies to s 104 assessments of effect) the Environment Court in *SKP Incorporated v Auckland Council* stated:[19]

> [48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

CODC

31. The evidence of Ms Collie identifies key effects at [31].

Permitted Baseline

32. Commencing with the permitted baseline, Ms Collie differs from Ms Stirling in finding that the permitted baseline in respect of noise is relevant, accepting there are differences in duration between what is likely to occur as a result of permitted activities as compared to this proposal.[20] However Ms Collie, in reliance on the assessment of Mr Hegley, determines the noise effects of this proposal are appropriate and deserving of consent without requiring the discount of effects resulting from application of the permitted baseline to reach such a conclusion.

Visual amenity and landscape character

33. The evidence of Mr Moore details the analysis he has undertaken and records that he has reviewed his earlier assessments on the basis of the updated site plans dated 22 April 2024. That review of earlier assessments has led Mr Moore to largely confirm his earlier ratings albeit with some adjustments and refinements.

[19] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [48].
[20] EiC Collie at [37] – [41].

34. Mr Moore's analysis engages with effects on landscape values, effects on natural character and visual amenity effects for private properties.

35. Mr Moore's summary of effects on landscape values:[21]

    a. Refers to key context and character features of the environment that contribute to landscape quality and amenity values;

    b. Identifies the Site is mainly a low terrace landform/river flat which has been significantly modified by agricultural use (under pasture and grazed) and historic gold mining activity;

    c. Notes the Site is not recognised as an area of outstanding natural landscape (ONL) or Significant Amenity Landscape (SAL) in the CODP;

    d. Assesses landscape impacts of the operation, including acknowledgement of the limited duration of the operation, consideration of mitigation measures, and the progressive rehabilitation proposed; and

    e. Determines there will be varying degrees of effect on landscape values during the life of the project and assesses long-term effects following final rehabilitation.

36. The assessment with respect to landscape and natural character appropriately records the proposed mining is largely beyond the Clutha River / Mata-Au margin.

37. The above matters therefore properly acknowledge the specific attributes of the receiving environment and details of the proposal as advanced.

38. Taking account of written approvals from the majority of surrounding property owners, there are two specific addresses which Mr Moore has provided particular commentary on.[22] That analysis engages with the differing level of effects arising for each property by reference to the staged

[21] EiC Moore, at [8] – [19].
[22] EiC Moore, at [20] – [25].

works on the Site, concluding a range of visual effects from minor for certain stages to less than minor for the balance. This granular analysis reflects an appropriate real world assessment.

39. The peer review by Ms McKenzie raised in the first memo appeared various issues which the applicant subsequently responded to with input from Mr Moore. Subsequently Ms McKenzie's second memo acknowledges the updated plans set results concerns about the level of information and clarity relating to site management, staging and location of visible elements, and accordingly concludes that any adverse effects on views and visual aspects can be adequately mitigated (subject to conditions and an amendment to bunding along the river boundary).

40. The evidence of Mr Moore and Ms Collie confirm additional bunding and revised conditions in response to matters raised. Accordingly both Mr Moore and Ms Collie conclude that the proposal will result in an acceptable level of visual and landscape effects, a conclusion which Ms McKenzie aligns with.

41. As a result, Ms Stirling's view that she cannot conclude that the adverse landscape and visual effects will be acceptable[23] does not align with the expert assessments – further her concerns have been answered through the combination of updated plans, additional mitigation measures, and revised conditions of consent - I refer you to the assessment of Ms Collie in that regard.[24]

Noise

42. Noise has been the subject of detailed assessment. HML's expert, Mr Hegley, is vastly experienced. The evidence of Ms Collie summarises the issue, concluding that both daytime and nighttime noise levels are acceptable.[25] Of note:

[23] CODC s 42A Report, at [72] – [73].
[24] EiC Collie, at [50] – [51].
[25] EiC Collie, at [52] – [60].

a. Mr Hegley's assessment is extremely conservative for reasons he explains in evidence. He has assessed the application as proposed with a significant factor of safety in adopted assumptions.

b. The modelled noise levels at notional boundaries comfortably comply with the daytime noise limit, being at least at least 5dBA L_{10} below that limit (which is a clearly noticeable difference).

c. The modelled noise levels also comfortably comply with nighttime noise limits being well below that night time level set in the plan to ensure sleep protection.

d. It is important to recall by reference to the highest levels of noise anticipated and referred to above (which still sit well below the District Plan standards) that these reflect the approximately 4 – 6 months per dwelling when the staged works are closest - for the rest of the time noise at each dwelling <u>will be below ambient noise levels</u>.

43. It follows that the assessed noise complies with a comfortable factor of safety with a permitted noise level which the plan anticipates is appropriate in this environment (being a method imposed to give effect to higher order objectives and policies).

44. For reasons addressed in the assessments and evidence on behalf of HML with respect to acoustic matters, Ms Stirling's apparent conclusion that potential noise generated from the proposal will be inappropriate is incorrect.

Vibration, Dust and Light spill

45. There is agreement as between HML's experts and Ms Stirling that these potential effects are appropriate subject to imposition of proposed conditions of consent.

Rural Character

46. In my submission Ms Collie's analysis[26] is accurate. From a legal perspective I simply observe:

    a. Ms Collie is correct in her approach that effects on rural character must be informed by findings on considerations such as visual amenity, landscape character, noise, dust and vibration.

    b. Mining as an activity has a functional need to locate where the resource in question is located. In that context it is unsurprising that mining is an activity which may be anticipated in a Rural Resource Area.[27] Ms Collie observes that Mr Moore uses the term "semi–industrial" in his report and evidence, but that is with respect to an unmitigated mining operation. I would add that on a real-world assessment new mining activities will not establish in an urban environment, even if it were zoned industrial. Thus mining can sit appropriately within a rural area, subject to appropriate mitigation of its effects.

Archaeological and Heritage values

47. Archaeological matters are the subject of detailed assessment in Ms Ross's report. Ms Collie's assessment identifies[28]:

    a. There are no currently known Māori archaeological sites within the project area.

    b. Existing, known archaeological sites that will be affected relate to gold mining and domestic occupation of the Site.

    c. Carefully calibrated mitigation is proposed.

[26] EiC Collie, at [67] – [71].
[27] The CODC s 42A Report acknowledges at [103] that Policy 4.4.9 of the CODP states that mining activity is expected to be located in a rural environment.
[28] EiC Collie, at [72] – [76].

48. In summary the known archaeological sites within the project area have low to moderate value.[29] Turning to the degree of impact, G43/232 and G43/285 will only be moderately impacted. G44/159 which has low archaeological values will be destroyed by the proposed works however recording during removal may provide information not previously available. G43/233 which has moderate value will be largely destroyed however a small area will be retained.

49. Turning to unrecorded sites, an accidental discovery protocol is the orthodox method of handling discovery of items of archaeological value, and the applicant has applied for an archaeological authority under Section 44 of the HNZPTA 2014.

50. Taking account of known archaeological sites within the works footprint, and recorded archaeological sites evidencing manawhenua activity in the wider landscape (G43/2 is recorded approximately 730m northwest of the project area, and G44/12 is recorded approximately 230m southeast of the project area), HML has adopted Ms Ross's recommended mitigation which includes:[30]

    a. Assessing and allocating the site into differing risk areas to inform the approach taken to works;

    b. Archaeological monitoring of all topsoil stripping in high risk areas using specified equipment;

    c. Two specific test trenches to be excavated in the vicinity of Tima Burn, with an invitation extended to manawhenua to attend, for the specific purpose of informing assessments of the likelihood for encountering intact archaeological material relating to pre-1900 Māori activity. Further works in this area are dependent on the outcome of the test trenching exercise and (subject to what is discovered) the potential for further informed assessment of values and potential effects.

[29] EiC Ross, at [9] – [13].
[30] EiC Ross, at [20] – [35].

d. The relocation of visible artefactual remains (dredge buckets, spindle axle, haul rope) currently on private land to a location close to the cycleway along with installation of interpretive signage. This will enable members of the public to engage with and understand the history of the site and surrounds.

51. HML's position in reliance on the assessment of Ms Ross and Ms Collie is that archaeological values can be appropriately mitigated to a degree that is acceptable and deserving of consent.

Transport and Flood Hazard

52. Transport is addressed by Ms Collie at paragraphs [87] – [91] and in the evidence of Mr Copland. Flood hazard has been addressed by Ms Collie at paragraphs [92] – [97] and in the evidence of Mr Williman. In both cases, technical work has been undertaken to inform a conclusion that effects of the proposal are acceptable. In each case there is a small difference of opinion with Council reporting officers with respect to proposed conditions. For transport, Mr Copland suggests an alternative access solution is appropriate and with respect to flood hazard, Mr Williman advises that the duration of excavation within the flood hazard overlay does not need to be limited to 6 months.

Public Access

53. Ms Collie's assessment of public access at paragraphs [98] – [106] identifies that public access will be maintained. For reasons identified in her assessment it is unclear why any concern has arisen with respect to this consideration.

Biodiversity

54. Indigenous flora has been assessed by Dr Wills and potential effects on lizards and skinks has been assessed by Mr Chapman. Their conclusions are that effects on biodiversity are acceptable, those conclusions being adopted by Ms Collie at paragraphs [107] – [111].

Cultural values

55. Cultural values in the context of district matters are assessed by Ms Collie at paragraphs [118] – [129]. Ms Collie carefully, within the confines of her expertise, identifies how she has approached an assessment of cultural matters acknowledging that there may be further information to be provided by Kā Rūnaka. With respect to known values Ms Collie identifies how potential effects are avoided or mitigated. Beyond that, she quite properly indicates that she retains an open mind in regard to other matters Kā Rūnaka may seek to address in evidence or include in draft conditions.

Positive effects

56. Positive effects are addressed by both Ms Collie and Mr MacDonell in evidence. These effects are summarised later in my submission in the context of commentary about regional consent matters.

ORC

57. Regional planning effects have been addressed by Mr MacDonell at [15] – [60].

58. There is a high degree of alignment between the effect conclusions of Mr MacDonell and Ms Ter Huurne.[31]

59. Mr MacDonell and Ms Ter Huurne agree that the proposal will result in less than minor effects on aquifer allocation, surface water bodies and allocation, natural character and amenity values, surface water quality, freshwater quality, and air quality and human health. These matters can be managed appropriately by way of consent conditions.

60. The remaining areas of disagreement relate to cultural values, historic heritage, and groundwater quality which are considered by ORC to result in at least minor effects. Mr MacDonell is correct in his statement that in the

[31] Ms Ter Huurne authored the ORC s 42A Report.

context of an overall discretionary activity, a finding of a minor effect does not present a barrier to consent.[32]

Written Approvals

61. As already mentioned, as a matter of law,[33] any effects on persons who have given their written approval must be disregarded for the purposes of assessment under s 104(1).

62. HML has engaged with affected and potentially affected landowners. The application noted that a number of bores in the surrounding area may be affected by dewatering. At the time of writing, HML has obtained written approval from all but one bore owner (of those bores identified as potentially affected).[34]

63. Mr MacDonell's evidence provides an update[35] on the written approval process attaches additional written approvals in Appendix A.

64. Additionally, I confirm all landowners within the mining footprint have provided written approval (with the exception of CODC) to the regional application.

The Environment and Permitted Baseline

65. Ms Ter Huurne[36] and Mr MacDonell[37] agree as to the identification of the receiving environment and the application of the permitted baseline.

66. I agree with those conclusions and say further that the permitted baseline is not relevant to your consideration of the effects of the proposal. HML's evidence was advanced on the basis that the permitted baseline did not apply.

[32] EiC MacDonell at [185].
[33] Section 104(3)(a)(ii).
[34] Ms Gunn has not provided written approval with respect to her two bores.
[35] EiC MacDonell at [23] – [6].
[36] Refer ORC s 42A report at 6.1.1, pp. 30 – 31.
[37] EiC MacDonell at [20].

Positive Effects

67. Ms Ter Huurne and Mr MacDonell do not agree on the proposal's positive effects. I submit that Ms Ter Huurne's concerns predate HML's evidence exchange and have been specifically addressed by the applicant's corporate witnesses.

68. The uncertainty of local employment opportunities is resolved by reference to the evidence of Mr Hawkeswood that:

    a. The proposal will result in 20 – 25 fulltime employment opportunities onsite with a further 8 – 10 offsite and contractor positions;[38] and

    b. Approximately 90% of all employment positions will be from the local and wider Millers Flat community.[39]

69. Further, I note that from an operational perspective, Mr Johnstone concludes at [21] that he does not expect any delays to be associated with recruitment as in his opinion many locals would be interested in employment opportunities.

70. Ms Ter Huurne also raises a concern that there is insufficient evidence as to how the proposal will support the local or regional economy. I submit that concern is resolved by reference to the evidence of Mr Hawkeswood which provides that approximately $28 million will be directly paid in local employment renumeration and royalty payments.[40] Significant economic flow-on effects for the local community are also anticipated.[41]

71. Ms Ter Huurne's conclusion that the application does not "demonstrate that the benefits are so compelling that consent should be granted" is misguided. The RMA does not elevate the status or consideration of positive effects, nor is there a requirement for positive effects to be "compelling" in

[38] EiC Hawkeswood at [12].
[39] EiC Hawkeswood at [13].
[40] EiC Hawkeswood at [14].
[41] EiC Hawkeswood at [15].

light of other considerations. In my submission, the consideration of positive effects of this proposal are relevant to your s 104(a) assessment.

Aquifer Allocation

72. Mr MacDonell[42] and Ms Ter Huurne[43] agree that any adverse effects of the proposal on aquifer allocation will be less than minor. This is supported by Mr Heller's evidence.

73. I note that Mr Heller agrees to all ORC recommended conditions relating to the aquifer and suggests a change to proposed condition 15 of the water discharge permit to improve clarity.[44] That change is supported by Mr MacDonell.[45]

74. Thus, I submit that any adverse effects on aquifer allocation will be less than minor.

Effects on Surface Water Bodies and Freshwater Ecology

75. Turning to the consideration of effects on surface water bodies and freshwater ecology, the evidence of Mr Heller and Mr Allibone provide comprehensive assessments and conclude that any potential adverse effects arising from the proposal will be no more than minor.

76. I note that there is also a high degree of alignment between Mr MacDonell and Ms Ter Huurne with respect to surface water and freshwater ecology effects. Importantly, there is agreement that the proposed conditions of consent requiring ongoing monitoring of flows and flow augmentation for the Tima Burn provide appropriate mitigation.

77. As identified in Mr MacDonell's evidence,[46] there remains a difference of opinion between the applicant's experts and Ms Ter Huurne with respect to the wording of groundwater permit recommended condition 13.[47] I submit

[42] EiC MacDonell at [26].
[43] ORC s 42A report at 6.1.2, pp. 32 – 33.
[44] EiC Heller at [61] – [62].
[45] EiC MacDonell at [63].
[46] EiC MacDonell at [29].
[47] Relating to an agreed level of dissolved oxygen.

that Mr Allibone's evidence[48] more accurately captures the degraded nature[49] of the lower Tima Burn which has a small low/no flow and low dissolved oxygen tolerant fauna.

78. Further, Mr Allibone concludes that the lower Tima Burn does not naturally maintain an 8 mg/L dissolved oxygen and therefore the requirement to maintain that level is not necessary from an ecological perspective. Mr Allibone's assessment shows that in the event that there is some reduction in flow, such reduction will not impact on any significant ecological values.

79. I submit that Mr Allibone's evidence is to be preferred and that any potential effects on surface water bodies and freshwater ecology including the Tima Burn are appropriately mitigated through proposed conditions of consent.

Groundwater Quality and Other Water Users

80. Mr MacDonell's evidence states that chemical inputs are not used in the mining process and the remaining issue in contention relates to potential for the cone of depression created by water abstraction to extend to an area where it "draws out" contaminated water from below or in proximity to the old, closed landfill.

81. In my submission and in reliance on the conclusions of Mr Heller and proposed conditions of consent, the potential effects in respect of groundwater contamination are expected to be no more than minor.

82. Turning to consider potential effects of the proposal on other water users, I note that HML's application material and evidence address these matters in detail and conclude that effects are appropriately managed.

83. Mr Heller's evidence records that a revised assessment on the potential impact of drawdown upon nearby wells has been undertaken by reference to HML's updated mining methodology.

[48] EiC Allibone at [54] – [55].

[49] I note here that Mr Hamer (peer reviewer) agrees with the conclusion that the lower Tima Burn is in poor health.

84. As a result of that re-assessment, Mr Heller concludes that two additional wells (G43/0184 and G43/0184 owned by the Fairhursts) may be affected by more than a 0.2 m maximum seasonable drawdown from mining activities.[50] I note that the Fairhursts provided written approval to the application on 20 April 2024[51] and therefore any adverse effects on those persons must be disregarded.

85. In my submission, the evidence of Mr Heller demonstrates that the potential adverse effects of drawdown on bores will be less than minor. The conditions of consent proposed appropriately mitigate any adverse effects and will ensure that any actual effects on domestic wells arising from the proposal will be remediated or supplied an alternative drinking water source.

Natural Character and Amenity Values

86. It is acknowledged that the Site is located in proximity to the Tima Burn and Clutha River/Mata-Au which have a number of natural character, amenity and recreational values.

87. In response to matters raised in the s 42A report by Ms McKenzie,[52] HML has made further refinements to the proposed staging of the mining activity and has provided an updated package of site plans dated 22 April 2024. Those plans provide increased clarity as to the proposed staging of the mining activity including the location of visible elements of the mining activity and proposed mitigation measures including additional bunding along the Clutha Gold Trail.[53] I submit that the Applicant's updated plans, conditions and additional bunding respond appropriately to the concerns held by Ms McKenzie.

88. There is a high level of agreement between Mr MacDonell and Ms Ter Huurne that the potential effects on natural character and amenity values on the Tima Burn and Clutha River/Mata-Au will be less than minor. I also

[50] EiC Heller at [41].
[51] Refer EiC MacDonell Appendix A.
[52] Most notably in relation to a need for greater detail on the proposed works.
[53] EiC Moore at [28].

note that HML has taken care to ensure that mining activities are appropriately setback from the Clutha River/Mata-Au and other waterbodies.

89. In my submission, the updated site and staging plans, increased visual mitigation measures and robust conditions of consent[54] ensure that any adverse effects on natural character and amenity values are appropriately reduced. Thus, there are no visual or amenity related reasons why consent cannot be granted.

Air Quality

90. The predominant air discharge arising from the proposal will be particulate matter (i.e. dust) arising from activities associated with the alluvial mining process such as topsoil and overburden removal, stockpiling, and vehicle movements on roads and accessways.

91. I note that as a result of written approvals obtained by HML, the adverse effects arising from dust on those persons identified at [17] – [18] of Mr Goodhue's evidence are to be disregarded.

92. Mr Goodhue's evidence concludes that with appropriate mitigation measures the adverse effects on air quality and human health will be less than minor. ORC's peer reviewer, Mr Brown, agrees with Mr Goodhue's proposed mitigation measures and conclusions.

93. Ms Ter Huurne[55] and Mr MacDonell agree that the proposed mitigation which will include a robust Dust Management Plan (**DMP**), operation of water trucks onsite, the installation of a weather station and two real-time PM_{10} monitors, are appropriate.

94. I submit that the known sources of dust generation combined with the inherent wet nature of the mining methodology proposed and

[54] Explored further in the evidence of Ms Collie.
[55] ORC s 42A report at 6.1.11, pp. 45 – 47.

comprehensive suite of conditions (including a DMP) are appropriate to address any adverse air quality and human health effects.

Cultural Values

95. The evidence of Mr MacDonell deals with regional consent considerations which encompasses a range of potential effects of particular concern to Kā Rūnaka. The effects commentary of Mr MacDonell is therefore relevant to his conclusions on cultural values and the proposal's alignment with a range of relevant policy statement and plan provisions which address matters of concern to Ka Kunaka. Because this forms the bulk of Mr MacDonell's evidence it is too lengthy to summarise here. However, in my submission Mr MacDonell's careful analysis can be relied upon by you subject to my observations as to relevant legal principles later in this submission, and acknowledging that Mr MacDonell (like Ms Collie) has specifically identified that further information from Kā Rūnaka may be forthcoming which would further inform his assessment.

Historic Heritage Values

96. There is disagreement between HML and the ORC regarding the degree of effect with respect to historic heritage values.[56] Mr MacDonell's evidence[57] agrees with and supports the conclusions on historic heritage values contained in the statements of Ms Ross and Ms Collie.

Plans - Objectives and Policies

97. There is a plethora of planning provisions relevant (to varying degrees) to this matter by reference to section 104(1)(b). These considerations are the subject of detailed assessment in the application for consent and supporting documentation, in the evidence of Ms Collie and Mr MacDonell, and in the CODC and ORC section 42 A Reports. There is no utility in these legal submissions attempting to address all of these matters in summary –

[56] ORC s 42A report at 6.1.9, pp. 42 – 44.
[57] EiC MacDonell at [53].

that would be both repetitious and result in legal submissions of unnecessary heft.

98. Consequently I focus on relevant legal guidance to inform your approach to this aspect of your task.

"Have regard to"

99. Commencing with "have regard to", the proper approach is:

    a. "Have regard to" indicates matters that are required to be considered as part of the weighing-up process contemplated by s 104, as opposed to requirements or standards that have to be fully met.[58]

    b. The directive "must have regard to" is not to be elevated to mean "must give effect to". Rather, "the requirement for the decision maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted".[59]

Directive wording

100. Directive wording, and in particular the term "avoid", has been the subject of significant focus on recent case law.

101. The Supreme Court held in *King Salmon*[60] that various objectives and policies in the NZCPS are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others.[61] The Court stated that the differences in wording adopted matter. That observation applies to all environmental standard, policy statement and plan wording.

102. Of note in *King Salmon* were provisions using the term "avoid". That terminology (encompassing of course "avoiding" and "avoided") arises in a

[58] *Donnithorne v Christchurch CC* [1994] NZRMA 97 (PT).
[59] *Foodstuffs (South Island) Ltd v Christchurch CC* (1999) 5 ELRNZ 308; [1999] NZRMA 481 (HC).
[60] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.
[61] See discussion in *King Salmon*, at [127].

range of policy and plan provisions addressed in reports and evidence before you, albeit in most circumstances it is deployed accompanied by the familiar alternatives of remedying or mitigating. Where set out together, wording such as "avoiding, remedying or mitigating" anticipates any one of, or a combination of, those responses may be appropriate dependent on the circumstances.

103. Even where avoid stands alone, the concepts of remedying and mitigation remain relevant. Recent commentary from the Supreme Court in *Port Otago*[62] concluded that:

    a. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided.[63]

    b. The avoidance policies in the NZCPS are to be interpreted in light of what is sought to be protected (including an area's relevant values) and when considering any development, whether measures can be put in place to avoid material harm to those values and areas.[64]

104. The point effectively being made above is that even "avoid" terminology should not be applied in a binary and blunt fashion. The relevance of nuance referred to here, is also engaged with reference to plan provisions which adopt less directive terminology.

Assessing extensive provisions

105. The process of undertaking an assessment of plan provisions can be complex, because:

    a. Objectives and policies have different purposes. Effectively an objective is the desired outcome, whereas a policy is the means (method) by which an objective is implemented.[65]

[62] *Port Otago v Environmental Defence Society Inc* [2023] NZSC 112.
[63] At [64].
[64] At [68].
[65] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [69].

b. In addition, a particular plan will have a range of desired outcomes (objectives), addressing a region or district's particular resource management challenges, within the parameters of any national directives. It is likely those objectives cover the field from strongly protecting the natural environment at one extreme, through to strongly enabling activities, at the other.

c. Like objectives, policies may "pull in many different directions". The situation is more complicated where multiple planning documents are in play (regional policy statement, regional plan and district plan).

106. In the context of s 104D, the Environment Court has addressed the holistic requirements of the assessment, as follows (emphasis added):[66]

> [49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the **law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects", not individual effects**.
>
> [50] The **evaluation under subsection 1 (b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach.** As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.

107. In my submission whilst the assessment of plan provisions under section 104 is not the same as that required under section 104D, the exercise required is similar to the extent that a comprehensive analysis of relevant objectives and policies is needed. I acknowledge that for ease of reference, and to ensure the field is covered, line by line assessments of provisions are understandable, but this should not be conflated with an approach

[66] *SKP Inc & Onr v Auckland Council* [2018] NZEnvC 081.

which adopts a checkbox assessment methodology assuming positive findings are required for every single line.

108. The Environment Court's decision in *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council* is relevant. It points out that where objectives and policies seek to achieve certain effects outcomes, conclusions reached as to the effects of the proposal will be relevant.[67]

109. With respect to the latter point, when considering the proposal by reference to relevant plan provisions, the activity must be taken to be all components of that activity, both adverse effects and positive effects.

Te Mana o Te Wai

110. Te Mana o Te Wai is addressed by Mr MacDonell[68] with reference to the National Policy Statement on Freshwater Management 2020 (**NPSFM**).[69] His assessment draws upon the analysis of Mr Heller and Mr Allibone with reference to potential effects on water, water quality and the health and well-being of water bodies and freshwater ecosystems.

111. Te Mana o Te Wai and the NPSFM is a method by which sustainable management is achieved – it engages with both environmental considerations and human use values.

112. It follows that Te Mana o Te Wai does not require and is not intended to be an assessment of cultural values. Te Mana o te Wai is about protecting the health of the water so that it may contribute to the health and wellbeing of the wider environment (which includes people). Having said that, I acknowledge concerns in the Aukaha submission relating to mauri.

113. HML's response is that the additional technical information it has provided since the date of submission, the revised proposed conditions of consent and the information and analysis provided by Mr Heller and Mr Allibone,

[67] In other words, if it is determined that the effects are appropriate, then it follows that the objectives and policies seeking to achieve suitable effects outcomes have been satisfactorily achieved.

[68] EiC MacDonell, at [66] – [81].

[69] Amended January 2024.

illustrate that the health and well-being of water bodies and freshwater ecosystems and its mauri is protected. In that respect, I remind you that the proposal:

a. Is set back from water bodies, both in terms of physical works and any discharge;

b. The use of water is primarily nonconsumptive and no chemicals are utilised for the gold wash process;

c. The water used is from the Site and is returned to land on the same Site (post-treatment to settle sediment);

d. The water returned to land percolates back into the natural system;

e. There is no direct discharge to water bodies nor is there any direct take from those water bodies; and

f. To the extent there is any risk to water flows in the lower Tima Burn at certain times of year, a condition requires augmentation of oxygenated water at an appropriate trigger level.

Cultural Plan Provisions

114. HML acknowledges that at the time of writing Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kā Rūnaka) oppose these applications. HML also acknowledges that these papatipu rūnaka have shared authority for the Mata-au and represent hapū who hold mana whenua in this district.

115. Cultural effects are a category of effects on the environment, and it is accepted that cultural effects can be tangible or intangible.[70]

116. Tangible effects can include direct effects on the health and mauri (health force) and hauora (health) of water – with water being recognised as a living entity in its own right, on freshwater taonga (eg kakahi, īnanga and tuna), on native trees and terrestrial taonga (eg kauri), on the quality of air,

[70] *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council* [2019] NZEnvC 184 at [51] – [53].

on wāhi tapu (sites of significance to mana whenua), on the ability to collect and eat kaimoana, on ancestral maunga, and on cultural landscapes.

117. In respect of natural resources, it is appropriate to recognise the interlinked concepts of mana (authority), take noho (use) and kaitiakitanga (care).[71]

118. Other less tangible (but equally important) effects include effects on the relationship Māori have with their ancestral lands, waters, wāhi tapu and other taonga, their kaitiakitanga, and effects relating to loss of tikanga and mātauranga (knowledge) and limitation on rangatiratanga.

119. Where effects are based on beliefs, evidence of beliefs must, however, be probative and capable of being tested.[72]

120. Any effects of a more than minimal nature must be avoided, remedied or mitigated to achieve an acceptable level of effect.[73]

121. However there is no requirement for an applicant to demonstrate that there are no effects on cultural values and as important as the provisions in section 6(e), 7(a) and 8 are, they do not operate to confer a right of veto on any iwi or hapū in respect of any particular project.

122. In this matter the submission of Kā Rūnaka in section 4 refers to the Kāi Tahu ki Otago Natural Resource Management Plan 2005, the importance of the Mata-au and Tima Burn, and the potential for inappropriate development to degrade the values of these ancestral landscapes.

123. The importance of the Mata-au and Tima Burn, of indigenous species, and of waterways, ecosystems and the health of water more generally is acknowledged by HML. The evidence of behalf of HML, as summarised and analysed by Ms Collie and Mr MacDonell, addresses how potential adverse effects on these landscapes, features, ecosystems, habitats and species are

[71] *New Zealand Māori Council v Attorney General* [2013] NZSC 6 at [117].
[72] *Winstone Aggregates Ltd v Franklin District Council,* A80/2002, 17 April 2002 (EnvC); *Minhinnick v Minister of Corrections* A043/2004, 6 April 2004 (EnvC).
[73] *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [73].

avoided or mitigated by the features of the proposal and the manner in which it is proposed to be carried out secured by conditions of consent.

124. The proposal is not within and is set back from the Clutha/Mata-au. As already referred to, there is no direct take from or discharge to the river. The nonconsumptive use of water on the Site and its return to land on that Site does not disrupt in any material way the natural system.

125. At 5.6 the submission of Kā Rūnaka refers to "a draft wāhi tūpuna area known as the Mata-au River Trail with cultural values that include but are not limited to mahika kai, ara tawhito, archaeological values, nohoaka, wāhi tūpuna, water transport routes, place names, urupā, and pā." HML has not been provided with a copy of this draft mapping and therefore cannot comment on it unless it is provided in evidence.

126. It follows that the assessments of Ms Collie and Mr MacDonell have addressed cultural matters by reference to known information available to them and the technical assessments for HML. In that context, they have concluded that potential adverse effects appear to have been avoided or mitigated to an appropriate degree. Properly however they have signalled there is a degree of uncertainty in the assessment given more information may be forthcoming in the evidence for Kā Rūnaka.

Part 2

127. Part 2 matters are assessed at paragraphs [247] – [258] of Ms Collie's evidence and paragraphs [190] – [191] of Mr MacDonell's evidence. In my submission, their assessments are to be preferred to those of Ms Stirling and Ms Ter Huurne.

Submitters

128. Matters raised by submitters have been addressed in the application, supporting reports, further work undertaken by HML and subsequent amendments to the proposal, and in the comprehensive evidence exchanged by experts for the applicant. That there are no specific legal

issues arising in addition to those canvassed above requiring comment in advance of hearing submitters evidence.

Other Matters Arising

Scope

129. A small increase in the number of persons proposed to be working on site associated with the activity is identified in the evidence of Ms Collie. I briefly comment on whether there is scope for this change.

130. The general principles applying to scope under the RMA requires consideration of whether the proposed modification would result in the application being significantly different in scope or ambit from that applied for and notified in terms of the scale or intensity of the proposed activity, or the altered character or effects of the proposal.

131. In this case, the proposed modifications from 20 persons on site to 30 persons would not increase the intensity of the proposal in a manner which is more than de minimus and the character and effects would be the same or similar to those provided for within the original proposal.

132. This is not a case where issues of procedural fairness arise, because of the extremely limited nature of the change and its effects. Further, submitters appearing at hearing have an opportunity to address the matter if they wish.

Potential Conflict

133. By email on 6 May, Counsel received the following request:

> The Panel notes that in Mr Wills evidence statement he says at para 6 "*I am a Board member of the Roxburgh Gorge Trail Charitable Trust and a Director of the Central Otago Clutha Trails Company".* Please could Legal Counsel cover in legal submissions any perceived or actual conflict by this role and the role Mr Wills has in this case as an expert witness.

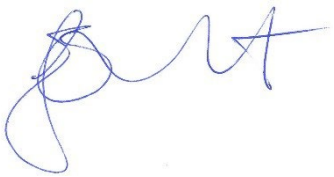
134. Dr Wills is a consulting scientist for a company. His evidence is limited to botanical/vegetative biodiversity which reflects his expertise.

135. The Central Otago Clutha Trails Company (**COCTL**) maintains the Roxburgh Gorge Trail and the Clutha Gold Trail. COCTL is owned by the shareholders of Roxburgh Gorge Trail Charitable Trust and the Clutha Gold Trail Charitable Trust. COCTL is a charitable organisation, and Directors are volunteers. The board makes strategic decisions, with those decisions being voted on and determined by majority. Operational matters are dealt with by employees.

136. COCTL have no commercial arrangement with the applicant. COCTL have not lodged a submission with respect to this matter. COCTL has given written approval to the proposal by reference to the proposed trail realignment on a temporary basis during certain stages of the activity (if consented). No benefit accrues to COCTL or to Dr Wills personally in the context of that written approval. Any planting proposed adjacent to the Trail benefits the landscape generally and does not (in the context of COCTL's charitable status) pose any risk of enrichment or similar type benefit which would give rise to conflict concerns for Dr Wills.

Conclusion

137. I submit for reasons addressed in the application, supporting reports, in evidence on behalf of HML and in this submission that consent should be granted subject to conditions for consent as proposed by HML.



_____

Jeremy Brabant

Dated 8 May 2024