

**BEFORE THE QUEENSTOWN LAKES
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

**SYNOPSIS OF SUBMISSIONS FOR:
New Zealand Tungsten Mining (#519/#1287)**

Hearing Stream 03- Historic Heritage and Protected Trees- Chapters 26 and 32

24 June 2016

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MAY IT PLEASE THE PANEL

1. Introduction

- 1.1 These legal submissions are presented on behalf of New Zealand Tungsten Mining Limited ("**NZTM**") in respect of Chapter 26 of the Proposed District Plan ("**PDP**").
- 1.2 NZTM is calling expert evidence from Carey Vivian (planning), Dr Hayden Cawte (heritage) and relevant industry evidence from Gary Gray in respect of Chapter 26.
- 1.3 The various consents and permits within the Queenstown Lakes District held by NZTM were considered in Hearing Topic 01. A full description of the NZTM operations and sites is included at paras 4-4.19 of Mr Gray's evidence in chief dated 21 April 2016.

2. Executive Summary

- 2.1 These legal submissions consider the following issues:
 - (a) Procedural matters of the PDP process;
 - (b) An overview of the NZTM case in the PDP;
 - (c) The structure of the PDP for mining activities;
 - (d) The identification and protection of heritage landscapes under the RMA (including the Glenorchy Heritage Landscape ("**GHL**"));
 - (e) Assessment of the appropriateness of modern day mining within the GHL;
 - (f) An overview and recap of an effects based approach to providing for all activities which exist and operate within the rural zone; and
 - (g) Modern day mining provides for a current connection to a heritage landscape.

3. **Procedural matters**

3.1 *Previous Hearing Streams*

3.2 NZTM have had significant involvement in the hearings to date for the PDP, including by presenting the following:

- (a) Legal submissions dated 22 March and 30 March in respect of Hearing Stream 01B (strategic direction, urban development and landscapes);
- (b) Evidence of Carey Vivian (planning) dated 26 February 2016 in respect of Hearing Stream 01B (strategic direction, urban development and landscapes);
- (c) Legal submissions dated 23 May 2016 in respect of Hearing Stream 02 (rural and rural living);
- (d) Evidence of Carey Vivian (planning) dated 26 February 2016 in respect of Hearing Stream 02 (rural and rural living); and
- (e) Evidence of Gary Gray (mining industry) dated 21 April 2016 in respect of Hearing Stream 02 (rural and rural living).

3.3 In addition to the above, NZTM supported in full the submissions and presentation made by Mr Knapp of Strattera in respect of Hearing Stream 01B.

3.4 The sequence of materials presented above sets the scene for NZTM's case and presents a coherent story to follow in order to understand the relief being sought in Chapter 26.

3.5 The amended provisions provided by Mr Vivian in Hearing Streams 01B and 02 provide the higher order framework from which the lower order provisions in this hearing flow.

4. **An overview of the NZTM case in the PDP**

4.1 An overview of the NZTM case in the PDP follows:

- (a) NZTM seeks to achieve a balance that gives effect to the purpose of the Act by providing for important natural, heritage, and landscape values identified by sections 6 and

7 of the RMA, while not sterilising the known mineral resource. NZTM also considers it important that future proposed mining operations should be assessed on their merits, on a case by case basis.

- (b) Mining is a unique industry, as recognised by the carve-out of minerals in section 5 from the requirement to sustain the potential of resources for future generations. Minerals are finite and are not subject to that aspect of sustainable management.
- (c) Mining within the Queenstown Lakes District, and particularly Glenorchy, provides important layers to the District's cultural and landscape values and characteristics which are enjoyed in the present day. The operative and proposed regional policy statements for Otago recognise the importance of mining to the Region and these are relevant for informing the PDP.
- (d) Mining differs from other land uses that occur in the Rural Zone because suitable locations for mining are wholly dictated by the location of the mineral resource. There is no ability to consider alternative sites where the activity could occur and then consider a range of factors to weigh up the most appropriate site. "New sites" cannot be found, if the minerals are not there or are not economically recoverable. The consequence is that if mining is unacceptable in a particular location because of other considerations, then that represents an opportunity foregone. The opportunity cannot be realised elsewhere.
- (e) Adverse effects of mining are temporary and modern mining methods and rehabilitation techniques continue to advance and improve.
- (f) Outstanding natural landscapes and features must be adequately identified for the qualities which they exhibit, in order to then provide fit for purpose protection. Unqualified blanket protection of ONFLs is not required, nor is it appropriate, under Part 2 of the Act.

(g) Providing for modern day mining within an existing heritage mining landscape will provide a contemporary connection to that place which has social and cultural benefits for the community.

4.2 This hearing provides more detailed planning provisions for the NZTM (current and future) operations undertaken within the Glenorchy Heritage Landscape. The relief sought within this hearing is to appropriately protect the landscape while allowing for continued maintenance and enhancement through modern day mining.

4.3 The final involvement of NZTM in the PDP will be in the rezoning hearings to be heard early 2017. NZTM seeks that the ONF line at the base of Mt Alfred be amended to match the true classification and topography of the landscape. NZTM's earlier submissions considered the law relating to identification and protection of ONFLs and continue to consider that there is a procedural and legal issue with forming the text of the Landscape Chapter prior to determination of the extent and features of the landscapes.

5. **Structure of the PDP for mining and activity status:**

5.1 The PDP provides for mining activities through the following chapters; Strategic Direction (3), Rural Zone (21), Historic Heritage (26). The Rural Zone provides the bulk of standards directly relevant for mining.

5.2 The key provisions recognising the existence of mining sit within and under the following Objective:

21.2.5 Objective- Mineral extraction opportunities are provided for on the basis the location, scale and effects would not degrade amenity, water, wetlands, landscape and indigenous biodiversity values.

- 5.3 New policies have been added into the Chapter through the Council's right of reply for Hearing Stream 02 which provide for compensation and reverse sensitivity aspects of mining.¹
- 5.4 Mining activities then range from permitted (limited forms of prospecting and minor extraction) to controlled (exploration up to 20m³), to discretionary for larger scale mining.
- 5.5 A discretionary application for mining will be assessed for appropriateness against the higher order strategic direction provisions, and (probably) the Landscapes Chapter (6) if relevant. Assessment matters for ONFLs are also contained within the Rural Chapter and include considerations of vegetation disturbance, effects on landscape quality and character, visual amenity, and cumulative effects. Policies and objectives are also contained within the Landscapes Chapter to guide the above determinations.
- 5.6 Landscape assessment matter 21.7.1.3(c) also requires consideration of cultural attributes, including historical and heritage associations.
- 5.7 The definition of earthworks excludes mining activities (defined) as amended through Plan Change 49.²
- 5.8 Associated services to mining may also require consideration of broader rules in the plan, such as temporary buildings and effects of activities on the surface of lakes and rivers.
- 5.9 In addition to the above, the NZTM operations are focussed on where historic mining sites were established over Scheelite Reefs at Glenorchy. The Glenorchy Heritage Landscape ("**GHL**") provides a further layer of protection of historic heritage through the PDP for assessing proposed mining activities.
- 5.10 The point of the above list is to show that although mining is a discretionary activity in the PDP, it has many stringent layers and

¹ Policies 21.2.5.5; 21.2.5.6 Council's Right of Reply Rural Chapter 21, dated 3 June 2016

²Consent Order: *Arrowtown Downs Limited, Coronet Estates Limited, Malaghans Park Limited, Remarkables park Stud Farm Limited and Wakatipu Retreat Limited v Queenstown Lakes District Council* (ENV-2015-CHC-75) Judge Jackson, Christchurch, 13 April 2016.

levels of protection it has to be assessed against before it can proceed. That list does not even cover the additional requirements relevant under separate legislation to the RMA when applying for mining permits.

- 5.11 It is also noteworthy that there is potential overlap or duplication in some provisions, such as the assessment of heritage effects under the GHM as well as cultural (heritage) attributes in the landscapes assessment matters. Provisions of the GHM should therefore be as focussed and as simple as possible in order to avoid potential inconsistencies.

6. The identification and protection of heritage landscapes under the RMA

- 6.1 'Heritage Landscape' is not a concept or defined term provided for in the RMA. The concepts separated out however are contained in outstanding landscapes (s6(b)) and heritage (s6(f)).

- 6.2 Moore J in the High Court in *TW Reed Estate v Far North District Council*³ determined the concept of heritage landscape appears to stem from a 2004 Department of Conservation-led study (the "**Bannockburn Study**") as relied upon by the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*.⁴ The study recognises that interpreting and managing heritage at a landscape scale would require different techniques to discrete heritage sites. The Court noted that:

"The methodology is interdisciplinary and involves spatial analysis using connectivities between superimposed layers of history".⁵

- 6.3 The concept however has not been applied by the Environment Court without caution. The High Court in *TW Reed* analysed different approaches of the Environment Court in determining the issues of heritage landscapes, noting that: *"it is the imprecision of*

³ *TW Reed Estate v Far North District Council* [2014] NZHC 3328 at [45].

⁴ *Waiareka Valley Preservation Society Inc v Waitaki District Council* C058/09 referring to *Bannockburn Heritage Landscape Study (Janet Stephenson & Ors, Bannockburn Heritage Landscape Study (Department of Conservation, Wellington, 2004)*

⁵ Above, n 4, at [45]

the language which has led to the criticism of the 'landscape heritage' construct".⁶ In that case, the Court found upon review that the Environment Court had actually applied the concept of protecting the wider curtilage setting of historic heritage features, rather than applying a heritage landscape construct and therefore it was:

"...not necessary to address whether rigorous multidisciplinary evidence was required".⁷

- 6.4 The Bannockburn Study (at over 113 pages) appears to have set a high water mark for the requisite evidence to determine a heritage landscape. The Environment Court in *Clevedon Cares Inc v Manukau City Council* considered the evidence of landscape expert, Ms Lucas, who had undertaken (in the Court's words) 'an exercise in accordance with the Bannockburn study'. The Court found (emphasis added):

*"[192] Ms Lucas was not assisted in her evaluation by any other expert as had been the case in the Bannockburn studies. As we have said, such an analysis is complex and requires a spatial analysis, **using connectivities between superimposed layers of history. It requires a multi-disciplinary input** covering historical, cultural, archaeological, and landscape expertise depending on the circumstances.*

*[193] Because of the strong direction in the Act to recognise and provide for matters of national importance, decision makers under the Act should not hold that a landscape qualifies as a cultural heritage landscape under Section 6(f) without adequate expert evidence of a probative nature. **There requires sufficient intensity of heritage fabric woven into the landscape to warrant the application of Section 6(f).**"⁸*

⁶ Ibid, at [53]

⁷ Ibid, at [74]

⁸ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 at [192]-[193]

- 6.5 The definition of a heritage landscape was also considered by Moore J in *TW Reed* by reference to the Bannockburn Study definition as follows (emphasis added):

"A heritage landscape is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

*The landscape methodology uses the concept of layered webs to analyse and highlight **key relationships between physical remains, key stories, and contemporary associations.***

*As development and subdivision make their own marks on the landscape, the older continuities become fainter, and their cohesion as a physical aspect of the past become more difficult to establish."*⁹

- 6.6 For comparison, the PDP definition of 'Heritage Landscape' is as follows:

*"Means land surfaces, (which are defined by their value and significance to a group in society) that have been modified by human activity and define significant past patterns of land use, relationships and experiences of humans with their surroundings, which may include cultural, spiritual, historic, aesthetic, ecological and scientific values. Heritage landscapes may encompass natural terrain, physical structures and processes, archaeological sites or remains, pathways, habitats, the context and setting of these areas and cultural meaning (beliefs and practices, histories and myths) with elements of these overlaying one another over time".*¹⁰

- 6.7 The method of identification of Heritage Landscapes in the PDP is not thoroughly analysed in the section 42A material for this Hearing Stream, or in Council's expert evidence from Mr Knott. The report of Jackie Gillies and Associates at Schedule 8 of the

⁹ *TW Reed Estate v Far North District Council* [2014] NZHC 3328 at [47] referring to para 1.4 Bannockburn Study

¹⁰ Chapter 2, Proposed District Plan as notified August 2015

s42A report¹¹ discusses the following matters for each heritage landscape it identifies:

- (a) Description of the site
- (b) Significant elements
- (c) Notes, issues, and recommendations
- (d) Threats and vulnerabilities
- (e) Key features to be protected

6.8 There is no description within the PDP as to the identification process, and there is no description in the Appendix 8 report as to how the PDP definition is applied to the appraisal. The method of identification and protection is, at best, unclear.

6.9 Of particular importance, and as identified by Dr Cawte at section 5 of his evidence, the methodology used to schedule the GHIL and the definition in the PDP do not appear to provide for relationships between physical remains, key stories, and contemporary associations as identified to be appropriate in the Bannockburn Study.

6.10 NZTM seek to recognise the importance of modern day mining within the GHL in order to provide a contemporary association to the heritage of the area. In this respect, the amendments to provision 23.12.9 (key features to be protected in the GHL) offered by Mr Vivian in reliance on Dr Cawte's opinion will provide the most appropriate recognition of the significant heritage layers.

7. **Protection of a Heritage Landscape**

7.1 The High Court in *TW Reed* also considered the level of protection required for a heritage landscape once identified; at para 65 Moore J discussed:

[65] As is apparent from the case law, s6(f) applies to the protection of the specific heritage site and its surroundings. The degree to which those surroundings will be protected is

¹¹ Queenstown Lakes District Council Heritage Landscapes Appraisals September 2014

to be determined by reference to a range of considerations including those in Part 2 as well as the regional and district planning documents. The protection of the surroundings of a heritage site is supported by the learned authors of Environmental and Resource Management Law where it is noted that amenity and design control policies and rules may be introduced in district plans in recognition of the fact that:

The relationship between heritage buildings and new structures may be compromised by an incompatible design which diminishes the integrity of the heritage protection objective, and detracts from the value of heritage within the location.¹²"

(Footnotes omitted)

- 7.2 The Courts have consistently determined that protection under Part 2 of the Act is a subset or element of sustainable management, rather than an outcome in and of itself. The Act does not call for unqualified protection in any sense with respect to section 6 matters including section 6(f).
- 7.3 The Environment Court has applied that approach to the heritage landscapes construct as well. *Gavin H Wallace Ltd v Auckland Council*¹³ discussed the opposing views of parties as to whether a heritage landscape once identified was required to be protected from any future development at all, or whether there could be an acceptable level of planned sensitive development.
- 7.4 The Court ultimately disagreed with the Council's protective view in that case and determined that:

"[the opposing party had not] lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development."¹⁴

¹² Above, n 4, at [65]

¹³ *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120.

¹⁴ *Ibid*, at [79]

- 7.5 In determining the above, the Court referenced the Bannockburn Study and what the implications would be after making a finding that an area was an important heritage landscape (emphasis added):

"The practice of conservation ... is usually applied to historic places which are limited in extent - most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).

*... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because **it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this.** It is not possible to regard it simply as a heritage artefact- it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape"¹⁵*

- 7.6 In considering the above the Environment Court concluded that:

"sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from [the landscape], could be undertaken under the right planning regime...

[And that]:

*Such a regime would reflect the fact **that this is a living landscape.**"¹⁶*

¹⁵ Janet Stephenson, Heather Beauchop, and Peter Petchey, Bannockburn Heritage Landscape Study, Wellington, Department of Conservation, TePapaAtawhai, 2004, at pages 100 - 101

¹⁶ *Gavin H Wallace Limited* at [80]

- 7.7 The concepts from the Environment Court (that landscapes are living) are recognised in the Bannockburn Study which includes assessment of key relationships between physical remains, stories, and contemporary associations. That description accords with Dr Cawte's analysis of mining activities in the GHL at section 6 of his evidence, and in particular at para 6.8 that heritage is not a static quality that has already been produced, but is an evolving dynamic quality.
- 7.8 The amendments offered by Mr Vivian at 26.5.1 and 26.5.1.2 by clarification of the wording to include 'maintenance' as well as protection and enhancement of historic heritage will provide for acceptable levels of future development in order to achieve sustainable management of heritage resources

8. **'Double counting' ONLs and Heritage Landscapes**

- 8.1 The High Court in *TW Reed* noted the difficulty in overlapping concepts within the term Heritage Landscapes, and in particular the issue of double counting under s6(b) and s6(f).

"The Court cautioned against the use of the phrase "heritage landscape" in Maniototo Environmental Society Inc v Central Otago District Council noting that such usage:

... may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further the concept of a landscape includes heritage values, so there is a danger of double counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act."¹⁷

...

Further words of judicial caution were expressed by the Environment Court over the use of the term and its inclusion in the complex lexicon of the RMA, noting in Gavin H Wallace Ltd v Auckland Council:

¹⁷ Above, n 4 at [49] referring to *Maniototo Environmental Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208]

On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

(a) Heritage landscape is not a concept referred to in the Act;

(b) Outstanding landscapes and features are protected from inappropriate subdivision use and development by s 6(b) of the Act;

(c) Maori values are recognised and protected by sections 6(e), 7(a) and 8 of the Act

(d) Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and

(e) There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

*To introduce a new concept not recognised explicitly by the statute would, in our view, add to the already complex web of the Act and make matters more confusing.*¹⁸

- 8.2 As discussed above in respect of Landscape Assessment Matter 21.7.1.3(c) in the PDP, there is significant potential for undue 'double counting' of values which span across landscape and heritage matters.
- 8.3 The Commissioners should therefore be careful so as to not apply an unnecessarily restrictive standard to stagnate those areas through extra layers of protection.

¹⁸ Ibid, referring to *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]

9. **Modern day uses of heritage landscapes, including mining**

9.1 Dr Cawte and Mr Gray both consider the ways in which NZTM could facilitate contemporary appreciation of heritage mines in the GHL to provide continued enjoyment, understanding and connection to those areas.

9.2 In this respect, Dr Cawte concludes that the PDP does not have a means of valuing the ongoing occupation by an industry, or an original or long-term occupier who contributes to the overall historical social and cultural significance of a space... thus does not allow for the sustainable use of historic heritage.

9.3 The added new policy 26.5.4.4, amendments to objective 26.5.2.1 and amendments to the description of the GHL are all intended to achieve this concept. These amendments are partially accepted by Council and partially further amended by Mr Vivian to ensure consistency of resource management language where possible.

9.4 As discussed above, in *Gavin H Wallace*, the concept of a living heritage landscape is not new to the Court. The RMA does not require heritage to be preserved in the sense that it shall be maintained in an existing permanent state.

9.5 Therefore additions which seek to: 'recognise ongoing economic uses of heritage', 'the high likelihood of recommencing mining in the GHL', and the 'enablement of continued mining activities' are all acceptable legal concepts which give effect to section 6(f) of the Act and associated case law.

10. **An effects based approach**

10.1 The evidence of Mr Vivian discusses a potential consequential amendment to the definition of Farm Building to address Council's concerns over permitting further buildings in the rural zone where mining is (generally) a discretionary activity.¹⁹

¹⁹ Refer page 7 Mr Vivian evidence

- 10.2 For the avoidance of doubt, it is submitted that an amendment to the definition of Farm Building, instead of an included definition of mining building, will be within scope of the NZTM submission by way of consequential or alternative relief sought. This matter may be further addressed at the future hearing on definitions, but is also relevant in this hearing by reference to provisions 26.6.21 (activity standards – heritage landscapes).
- 10.3 The broader reasoning of including this change depends upon an effects-based approach under the RMA, which was discussed at length in the Hearing Stream 01B and 02 submissions of counsel for NZTM. Without repeating the point, the key issue is that all activities which by necessity exist or are associated to the Rural Zone should be provided for on equal footing and assessed for appropriateness by measuring their effects on the environment, rather than their merits.

11. Evidence

- 11.1 Dr Hayden Cawte has provided evidence assessing the relevance of historic heritage within the RMA and as provided for through the PDP. This evidence considers the key features of the GHZ and the level of protection appropriate to recognise those key features. Importantly, Dr Cawte provides an analysis as to the contemporary and living aspects of landscapes and heritage, concluding that the PDP should provide for modern day connections to the heritage of an area, for example modern mining in the GHZ.
- 11.2 Appendix 1 to Dr Cawte's evidence also provides a heritage impact assessment for NZTM in respect of its proposed exploration programme. This study provides an in depth analysis of the spatial layers of history topography, geology and geography of the GHZ and its surrounds. The study importantly recognises the area for what it is; a landscape which has been produced and modified through a history of mining settlement and development. It does not hold the landscape artificially to be pristine and natural. This study could be seen as more in the nature of a 'Bannockburn Study' for the purposes of assessing a heritage landscape.

- 11.3 Mr Gary Gray provides focussed evidence on the NZTM operations and locations. This evidence is intended to give the commissioners a real world view of mining and its effects, not just on the landscape, but through peripheral effects such as positive community and social contributions, long term regeneration of a site, and economic contributions to the District. Mr Gray also provides examples of international historic mining sites and describes how the nature of the mining cycle means that historic mines may be picked up where they left off in the modern day context.
- 11.4 Mr Carey Vivian provides planning evidence to support the relief sought by NZTM. The provisions offered by Mr Vivian are considered to meet the RMA purpose, and provide the Panel with legitimate alternative planning provisions to those notified in the PDP or amended through Council's latest versions in evidence. The Commissioners are reminded that the provisions offered by Mr Vivian are just examples of re-writes of the plan; these accord with NZTM's relief sought but there may also be different ways of expressing those provisions. In this respect, the Panel are invited to also consider 'halfway measures'²⁰ and alternative approaches.

12. **Conclusion**

- 12.1 The concept of a heritage landscape is not a defined term under the RMA and has been applied through the court system with varying degrees of ambiguity and caution.
- 12.2 Those heritage landscapes which have been assessed and accepted by the courts have been held to a high standard of evidence to show they exhibit section 6(f) qualities at a landscape scale.
- 12.3 The PDP should be cautious that its landscape provisions are particularly stringent and provide for potential overlap with heritage landscape protection. Any provisions purporting to

²⁰ *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70 para [12]

protect the same feature or matter under the RMA should be clearly justified in respect of a s32 analysis.

- 12.4 Despite the apparent deficiencies in the PDP's recognition of heritage landscapes, NZTM has not submitted to remove the GHL entirely. It instead intends to focus the protective provisions of the GHL and ensure its future operations can give effect to the purpose and objectives of Chapter 26.
- 12.5 Section 6 matters do not require absolute protection or avoidance of adverse effects unless a higher order instrument to the PDP requires that. Maintenance and enhancement of a heritage resource to provide ongoing use and association with a place can be an entirely appropriate outcome under the RMA.

Dated 24th day of June 2016

A handwritten signature in black ink, appearing to read 'Maree Baker-Galloway', written in a cursive style.

Maree Baker-Galloway

Counsel for NZTM